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No.

Supreme Court, U.S.
FILED

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JOSEPH F. SPANIOL, JR.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

MOBIL OIL CORPORATION,
Petitioner,
v.

BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT
TRUST FUND OF THE STATE OF FLORIDA,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA**

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QUESTIONS PRESENTED

1. Whether determinations as to the character of land made by the United States with the concurrence of the State under the Swamp and Overflowed Lands Act of September 28, 1850, 43 U.S.C. 982 *et seq.*, are, as a matter of federal law, conclusive against the State when those classifications rest on approved federal surveys, were confirmed by State selections, were solemnized by federal patents issued pursuant to the Act, were implemented by State deeds carrying forward the Congressional scheme and were recognized by the State as valid determinations for a century thereafter.
2. Whether a State judicial decision which retroactively and without compensation permits the State to annul and regain titles to land long recognized as having been conveyed to and vested in private ownership contravenes the Due Process Clause of the Fourteenth Amendment as an unconstitutional taking.

PARTIES BELOW

The parties to the proceeding in the Supreme Court of Florida are listed in the caption. The petitioner, Mobil Oil Corporation, is a subsidiary of Mobil Corporation. Coastal Petroleum Company was a defendant in the Florida trial court but did not perfect an appeal from the final judgment in favor of Mobil Oil Corporation.

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**PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA**

Mobil Oil Corporation petitions this Court to issue a writ of certiorari to review the decision of the Florida Supreme Court in this case.

OPINIONS BELOW

The decision of the Florida Supreme Court in this and a companion case (App. A, *infra*, pp. 1a) is reported sub nom. *Coastal Petroleum Co. v. American Cyanamid Co.*, at 492 So.2d 339. The decision of the Florida District Court of Appeal for the Second District in this case (App. D, *infra*, pp. 25a) is reported at 455 So.2d 412, and the decision of that court in the companion *American Cyanamid* case (App. E, *infra*, pp. 34a), which was adopted by reference in the present case, is reported at 454 So.2d 6. The decision of the Cir-

cuit Court for Polk County (App. F, *infra*, pp. 42a) is reported at 2 Fla.Supp.2d 12.

JURISDICTION

The decision of the Florida Supreme Court was rendered on May 15, 1986, with the express notation that it would not become final "until time expires to file rehearing motion and, if filed, determined" (App. A, *infra*, p. 10a). A timely motion for rehearing (App. G, *infra*, p. 52a) was denied on August 27, 1986 (App. B, *infra*, p. 22a). The judgment of the State Supreme Court (App. C, *infra*, p. 23a) was entered on the same day. This Court's jurisdiction is invoked under 28 U.S.C. 1257(3). *See discussion, pp. 15-25, infra.*

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Just Compensation Clause of the Fifth Amendment to the United States Constitution provides:

Nor shall private property be taken for public use, without just compensation.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides:

Nor shall any State deprive any person of life, liberty, or property, without due process of law.

The Swamp and Overflowed Lands Act of September 28, 1850, 43 U.S.C. 982 *et seq.*, in relevant part, provides:

Section 1, 43 U.S.C. 982:

To enable the several States (but not including the States of Kansas, Nebraska, and Nevada) to construct the necessary levees and drains, to reclaim the swamp and overflowed lands therein—the whole of the swamp and overflowed lands, made unfit thereby for cultivation, and remaining unsold on or after the 28th day of September, A.D. 1850, are granted and belong to the several States respectively, in which

said lands are situated: Provided, however, That said grant of swamp and overflowed lands, as to the State of California, Minnesota, and Oregon, is subject to the limitations, restrictions and conditions hereinafter named and specified in this chapter, as applicable to said three last-named States respectively.

Section 2, 43 U.S.C. 983:

It shall be the duty of the Secretary of the Interior, to make accurate lists and plats of all such lands, and transmit the same to the governors of the several States in which such lands may lie, and at the request of the governor of any State in which said swamp and overflowed lands may be, to cause patents to be issued to said State therefor, conveying to said State the fee-simple of said land.

The proceeds of said lands, whether from sale or by direct appropriation in kind, shall be applied exclusively, as far as necessary, to the reclaiming said lands, by means of levees and drains.

Section 3, 43 U.S.C. 984:

In making out lists and plats of the lands aforesaid all legal subdivisions, the greater part whereof is wet and unfit for cultivation, shall be included in said lists and plats, but when the greater part of a subdivision is not of that character, the whole of it shall be excluded therefrom.

STATEMENT

At issue here is the ownership of an upstream portion of the bed of the Peace River in central Florida as it existed in 1845.¹ The State (through the Board of Trus-

¹ Although other lands were embraced by the Complaint in this case, we have confined our focus to the areas claimed by the Trustees as the bed of the Peace River. We so limit our presentation because it does not appear that the State Trustees—as distinguished from their lessee, Coastal Petroleum Company, no longer a party to the only case before this Court—claim other parcels,

tees of the Internal Improvement Trust Fund) maintains that the river, in the relevant stretch, was navigable when Florida was admitted to the Union and that it accordingly owns the water bottoms to the ordinary high water mark. Petitioner, on the other hand, asserts that the portion of the river in suit was not (and is not) navigable and that the bed, together with adjoining lands, was properly conveyed as swamp and overflowed land to its predecessors a century ago. But it is not that disagreement that is tendered to this Court for resolution. Rather, the question presented is whether, in circumstances like those present here, such a factual issue ought to be open to litigation at all so long after the character of the land has been determined by final administrative action of the Secretary of the Interior in which the State participated and concurred pursuant to the Swamp Lands Act of 1850. We answer "No" and submit that in decreeing otherwise for the first time in this case, the Florida Supreme Court has both contravened federal statutory law and condoned a taking of private property without compensation in violation of the United States Constitution.

primarily those beneath and along various tributaries of the North Prong of the Alafia River, as "sovereign" lands underlying a navigable stream. In any event, however, the same arguments would be applicable to the Alafia River lands, which were also surveyed, without meandering of the stream, and were then embraced within federal patents and later State deeds as swamp and overflowed lands.

It should also be noted that there is a substantial disagreement between the parties as to the width of the bed of the Peace River as it existed in 1845, and as to the extent and legal effect of subsequent changes. But that dispute will be mooted if, as we contend, the State is now foreclosed from challenging the contemporaneous determination that the lands underlying the stretch of the river in suit were swamp and overflowed lands within the meaning of the Swamp Lands Act. For present purposes, the Court may assume that the State's definition of the bed is correct, and we accordingly so characterize the disputed lands hereinafter—without, of course, intending any binding concession should further proceedings be necessary.

1. Before detailing the particular facts of the case, it may be useful briefly to sketch the historical backdrop. Upon its admission to the Union in 1845, Florida—like all other newly admitted States—acquired title to the beds of inland navigable water bodies not previously alienated by the United States. These water bottoms—to ordinary high water mark—are what Florida denominates its “sovereignty lands.” They inured to the State by operation of the constitutional principle of “equal footing” and no grant from Congress or confirmatory patent by the United States was required. See *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 372-375 (1977). But, a few years later, Florida—in common with most “public land” States—also received very substantial lands from the United States by a wholly different route. This was the grant effected by the Swamp and Overflowed Lands Act of September 28, 1850 (*supra*, pp. 2-3), which, in the case of Florida, transferred some 22 million acres, almost two-thirds the entire land area of the State.

As its first Section makes clear, the 1850 Act reached areas which, in their natural state, were not suitable for cultivation because they were either swamps, requiring drainage, or were periodically overflowed by water, requiring the construction of levees. See *San Francisco Savings Union v. Irwin*, 28 Fed. 708, 710 (9th Cir. 1886), *affirmed*, 136 U.S. 578 (1890). In Florida, at least, this description encompassed the beds of all non-navigable water bodies, but no navigable streams. Congress, it should be noted, expressly declared that the purpose of the grant was to enable the land to be “reclaimed,” not preserved as wetland. Section 1, 43 U.S.C. 982, *supra*, p. 2. See *Wright v. Roseberry*, 121 U.S. 488, 496 (1887). And, to this end, the States were encouraged to sell the lands to private entrepreneurs, who were no doubt expected to expend something of their own efforts in reclamation. But the State also would

contribute, it being explicitly provided that all proceeds of sale must be devoted to building levees and drains. Section 2, 43 U.S.C. 983, *supra*, p. 3.

Another aspect of the Swamp Lands Act is of special interest here. A present grant as of the date of the statute was intended, and a precise statutory procedure for the identification of the granted lands was provided in the statute. *Wright v. Roseberry*, *supra*, 121 U.S. at 509. Congress established a clear and full procedure for classifying and transferring particular tracts of swamp or overflowed land. First, surveys were to be conducted by federal officers, indicating the boundaries of tracts deemed to qualify under the Act. Section 2, 43 U.S.C. 983, *supra*, p. 3. The federal surveyors were instructed that the beds of navigable water bodies—which, now, after statehood, did not belong to the United States and therefore could not be granted by it under the 1850 Act—should be expressly excluded on the survey plats by tracing a “meander line” that approximated the ordinary high water mark. See *General Instructions to Deputy Supervisors of Florida (1850)*, p.1; *Manual of Instructions to Regulate Operations of Deputy Surveyors (1855)*, pp. 6, 12, 13, 14, 18. After review and final approval of the surveys by higher federal authorities, the lists and plats of the lands determined by the Secretary of the Interior to be swamp or overflowed lands were then to be transmitted to the State Governor. Section 2 of the Act, 43 U.S.C. 983, *supra*, p. 3. See *French v. Fyan*, 93 U.S. 169, 171 (1876). The State was invited to select any or all lands classified as swamp or overflowed. *Ibid.* But the Governor was also free to dispute the classification, and not infrequently did so. See, Affidavit of Joseph R. Julin, pp. 20-21, Attachment C to Memorandum of Law in Support of Motion for Summary Judgment, R. 57.

Finally, after the State submitted its selection of land to the Secretary, the Act stipulated that an express

patent would be issued by the United States. Section 2, 43 U.S.C. 983, *supra*, p. 3. Once again, an opportunity for correcting error was thereby provided. And, obviously, the State authorities had still a further occasion to review the classification before actually selling the lands and issuing their own deeds to private purchasers.

2. Common experience tells us that all things contemplated by the law are not always done in fact. And when short-cuts have occurred, it is debatable whether courts should notice or turn a blind eye. But no such dilemma arises here because the letter of the law *was* followed.

Thus, the area in dispute—some 7,000 acres under and alongside the upper Peace River—was fully surveyed in the 1850's and classified as swamp and overflowed lands.² Nor was the Peace River or its navigable character overlooked. For some 40 miles upstream from its mouth on the Gulf of Mexico, the river was meandered, indicating the surveyor's opinion that this stretch was navigable and that the bed there could not therefore be classified as swamp or overflowed land. *See Burns v. Coastal Petroleum Co.*, 194 So.2d 71, 74 (Fla. 1st DCA 1966), *cert. denied*, 201 So.2d 549 (Fla.), *cert. denied*, 389 U.S. 913 (1967). But, further upstream, and long before the portion that concerns us, the surveyors obviously took a different view. They pictured the river on their plats and measured and plotted the width every time the survey took them across it (from 33 to 115 feet in our area), but they no longer meandered its banks. This, of course, reflects a conclusion that the upper reaches of the river were not navigable—as is confirmed by field notes which explicitly refer to the river in its widest part as “shallow water,” obstructed by “rapids, running over rocks.”

² We put to one side, for the moment, the very few parcels that were transferred to the State by so-called “internal improvement” land patents in 1876, 1878 and 1894 pursuant to the Act of September 4, 1841, 5 Stat. 453, or which inured to the State as “school sections” pursuant to the Act of March 3, 1845, 5 Stat. 788. See also n.1, *supra*.

See, e.g., Field Notes of W.G. Mosley for Township 32 S., R.25E. (1855) at 293, 304, part of Attachment E to Memorandum of Law in Support of Motion for Summary Judgment, R. 57.

The plats on their face indicate that they were subjected to the customary screening procedure within the Department of the Interior before final approval was given. Thereafter, the plats again had to be inspected in making out the lists provided for by Section 3 of the Act (43 U.S.C. 984, *supra*, p. 3), which required a computation whether or not the legal subdivision was mostly swamp and overflowed land. Only after these steps had been completed were the lists and plats transmitted to the State Governor—not all at one time, but in several groups, as the plats and lists were completed.

The State was an active and independent participant in this selection and classification process. By statute enacted in 1851, the Governor of Florida was authorized by the State Legislature “to take such measures as to him may seem expedient and most to the interest of this State in securing and classifying the lands lately granted to this State, designated as ‘swamp or overflowed lands. . .’” Ch. 332, § 1, Laws of Fla. (1851). The same statute provided funding for “examining the lands to be secured” and for procuring “maps, plats, records, field notes and other evidence touching the title and description of said lands.” *Ibid.* The Florida Governor was thereby armed with the authority and means to make an independent determination as to which lands qualified as “swamp” or “overflowed” and, if necessary, to dispute the Secretary’s classification. *See, Affidavit of Joseph R. Julin, p. 21, supra.* In due course, a succession of Florida Governors submitted requests for patents, and, after the usual delays—presumptively attributable to cautious re-checking—federal patents were prepared and issued to the State between 1856 and 1889. There were thus numerous occasions, over many years, to catch out any error in classifying the Peace River lands.

Finally, mostly in the early 1880's, the State itself sold the lands involved here at a fixed price per acre and issued unrestricted deeds of conveyance to petitioner's predecessors.³ The deeds were executed by the Trustees of the Internal Improvement Fund who, since 1855, had title to the State's swamp and overflowed lands (but not so-called "sovereignty lands" underlying navigable water bodies). See Chapter 610, Fla. Stats. (1855). Although ample opportunity existed, it appears still no one questioned the true character of the acreage as swamp and overflowed lands. In fact, as late as 1965, the State Trustees expressly disclaimed ownership of the bed of the unmeandered portion of the Peace River involved here. See *Burns v. Coastal Petroleum Co.*, *supra*, and the Trustees' Brief therein at pp. 13-14.

3. The present controversy was provoked by litigation initiated in 1976 in a different Florida Circuit Court (for Leon County) between petitioner and a mineral lessee from the State, Coastal Petroleum Company. Although the original breach of contract action has long since been settled, counterclaims in that proceeding, joined by the State Trustees, for the first time disclosed the State's new stance, claiming for itself as "sovereignty lands" areas beneath and along the Peace River deeded to petitioner's predecessors as swamp and overflowed lands. See the decision of the Florida District Court of Appeal in the Present case, App. D, *infra*, pp. 25a-27a. We need not recite the troubled procedural history of that lawsuit, which includes a removal to federal court and a ruling by the Eleventh Circuit vacating the district court decision and remanding the case to the State courts. See *Mobil Oil Corp. v. Coastal Petroleum Co.*, 671 F.2d 419 (11th Cir.), cert. denied, 459 U.S. 970 (1982). Suffice it to say that the Florida Supreme Court has now finally ruled—in this respect affirming the District Court

³ The most recent deed from the State covering any of the lands in suit (other than intervening tax deeds) was in 1909.

of Appeal—that those proceedings were no bar to the present quiet title action. *See App. A, infra*, p. 9a. On the other hand, petitioner remains exposed in that other suit to damages for alleged conversion of minerals which have been estimated by Coastal Petroleum at \$1.4 billion. *See Petition for Certiorari* in No. 82-379 at p. 11.⁴

The case now before this Court was begun by petitioner in the Polk County Court in 1982 against the State Trustees and Coastal Petroleum, the State's mineral lessee. Its object was to quiet title to lands beneath and alongside the Peace and Alafia Rivers that the State and its lessee were claiming, almost all of which had been patented to the State, and in turn deeded by the State, as swamp and overflowed lands. The trial court granted summary judgment in favor of petitioner (App. F, *infra*, pp. 42a). At the same time, that court entered a like judgment in a comparable action filed by the similarly situated American Cyanamid Company.

The State Trustees prosecuted an appeal in both cases while Coastal Petroleum did so only in the *American Cyanamid* case. The District Court of Appeal decided the two appeals the same day, but wrote separate opinions. In our case, the appellate court discussed only the claim that the Polk County Court should have dismissed or stayed all proceedings there because of the previously pending action in Leon County—an issue not presented to this Court—and overruled the plea. App. D, *infra*, pp. 27a-32a. As to the merits, the court simply adopted by reference its opinion in the *American Cyanamid* case—where full reasons were given for affirming the trial court. App. E, *infra*, pp. 37a-40a. Although it answered

⁴ This explains the statement of Florida's Chief Justice, dissenting, that "Contrary to the various suggestions that the present cases pertain to issues of environmental protection, it should be made known that what these cases involve is money * * * and the question of who gets it." App. A, *infra*, pp. 18a-19a.

all three in the affirmative, the Court of Appeal was persuaded to certify the following three questions to the Florida Supreme Court:

- (1) whether the concurrent classification of the area now in dispute as swamp and overflowed lands by both federal and State officers, evidenced by Nineteenth Century surveys, selections, patents and deeds, now precludes the State's claim that substantial portions of the lands conveyed were inalienable sovereignty lands;⁵
- (2) whether the well-established principle of estoppel by deed barred any claim of ownership by the Trustees; and
- (3) whether Florida's Marketable Record Title Act (MRTA) applied to deeds issued by the state or any of its instrumentalities.

A divided State Supreme Court reversed (except as to the procedural point) in an opinion covering both cases, answering each of the certified questions in the negative. App. A, *infra*, pp. 3a-9a. Four of the five apparently most relevant precedents of the court, *Pembroke*,⁶ *Lobean*,⁷ *Wetstone*⁸ and *Claughton*,⁹—all cited in the decisions under review and in briefs—were simply ignored by the majority. But see Chief Justice Boyd's dissent, App. A, *infra*, pp. 10a-20a. The most recent case, *Odom v. Deltona Corp.*, 341 So.2d 977 (Fla. 1976), was distinguished away as dealing only with unmeandered lakes and ponds,

⁵ We have re-phrased the first of these questions in the interest of clarity. Compare App. E, *infra*, p. 40a.

⁶ *Pembroke v. Peninsular Terminal Co.*, 108 Fla. 46, 146 So. 249 (1933).

⁷ *Trustees of the Internal Improvement Fund v. Lobean*, 127 So.2d 98 (Fla. 1961).

⁸ *Trustees of the Internal Improvement Fund v. Wetstone*, 222 So.2d 10 (Fla. 1969).

⁹ *Trustees of the Internal Improvement Fund v. Claughton*, 86 So.2d 775 (Fla. 1956).

but not unmeandered streams, and broader language in *Odom* was dismissed as improvident dictum. App. A, *infra*, pp. 7a-8a. As already noted, the Chief Justice, joined by another Justice except as to one point, dissented. App., *infra*, pp. 10a-20a. A motion for rehearing was denied without opinion. App. B, *infra*, p. 22a.

REASONS FOR GRANTING THE WRIT

For many years, federal, State and local governments have, through sometimes highly restrictive land use regulation, preserved or restored public values in private land, and this Court has not been ungenerous in sustaining such measures against the charge that they effected a "taking" of property without compensation. See, e.g., *MacDonald, Sommer & Frates v. Yolo County*, No. 84-2015 (June 25, 1986); *Williamson Planning Commission v. Hamilton Bank*, No. 84-4 (June 28, 1985); *Hodel v. Virginia Surface Mining & Reclamation Association, Inc.*, 452 U.S. 264 (1981); *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621 (1981); *Agins v. Tiburon*, 447 U.S. 255 (1980); *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980); *Penn Central Transport Co. v. New York City*, 438 U.S. 104 (1978); *Goldblatt v. Hempstead*, 369 U.S. 590 (1962); *United States v. Central Eureka Mining Co.*, 357 U.S. 155 (1958). Nor do we here challenge like regulation. On the contrary, even though private ownership of the river bed has been acknowledged by all until the last decade, petitioner has always respected local restrictions against phosphate mining within the 25-year flood plain of the Peace River, and otherwise complied with state and local environmental and reclamation regulations. So, also, we fully accept—indeed suggested—the reservation of public rights to use of the Peace River waters set forth in the trial court's judgment in this case. App. F, *infra*, p. 51a.

There are, however, some limits: regulation that "goes too far" in appropriating private property interests to

public uses will be struck down unless payment is made. *E.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Kaiser Aetna v. United States*, 444 U.S. 164, 178-180 (1979); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413-416 (1922). And so, it has become the fashion for States to ask their courts to declare that the land sought to be recaptured, although apparently unrestrictively conveyed into private hands in the last century, never left the public domain or did so only impressed with a pervasive "public trust" easement. *E.g., Summa Corp. v. California ex rel. Lands Commission*, 466 U.S. 198 (1984); *Hughes v. Washington*, 389 U.S. 290 (1967); see R. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 Iowa L.Rev. 631, 643-664 (1986). Cf. *California ex rel. State Lands Commission v. United States*, 457 U.S. 273, 277 (1982); *Robinson v. Ariyoshi*, 753 F.2d 1468 (9th Cir. 1985), vacated and remanded, No. 85-406 (June 23, 1986); *Nolan v. California Coastal Commission*, — Cal. App. 3d — (1986), juris. noted, No. 86-133 (October 20, 1986). This is another such case—which ought fare no better than its predecessors.

Let us be clear what is at stake. The Florida Supreme Court has invited the State authorities to question all private titles to land now or once underlying any water body arguably navigable in 1845, no matter that there was a joint federal-State determination under the Swamp Lands Act of 1850 that no navigable water bottoms were involved, that the subsequent deeds from the State were executed more than a hundred years ago, and that the grantees have been in undisturbed possession (and paid taxes) since then. In Florida alone, this implicates several million acres. The principle affects land holders large and small, as well as towns and counties, both as owners and as taxing authorities, and presumably reaches lands re-acquired by the United States for military and

other purposes. But, equally worrying, if left unreversed, the Florida decision encourages other States to be no less zealous.¹⁰ The disrupting effect of such a widespread clouding of land titles is difficult to exaggerate. Nor can one minimize the burden thrust on litigants and courts if old land classifications are indefinitely open to challenge and the historic status and dimensions of water bodies as of a State admission date must be reconstructed today, or tomorrow, accurately plotting all the intervening geographical changes, and determining whether each was natural or artificial, slow or sudden. *Cf. California ex. rel. State Lands Commission v. United States, supra*, 457 U.S. at 286 n. 14.

One might have supposed that this Court's recent unanimous ruling in *Summa Corporation* would arrest the new vogue for judicial revisionism in the service of the "public trust" doctrine. But it appears the lesson has been put aside as bearing only on Mexican titles confirmed by the Act of March 3, 1851. The time is ripe, we submit, for the Court to make clear that the 1851 Act does not stand entirely alone as a shield, and that, independently of any applicable federal statutes, the Constitution itself safeguards private property against the attempt to manipulate it out of existence without invoking the power of eminent domain and the attendant obligation to pay just compensation, whether the means employed involve judicial declaration, legislation, or administrative regulation.

To be sure, before intervening, the Court must be satisfied not only that a legal earthquake has occurred, but also that a substantial federal question is properly presented. We now undertake that demonstration.

¹⁰ Besides Florida, the Swamp Lands Act applied to all but three of the "public land" States, effecting particularly extensive grants in Arkansas, Michigan, Minnesota, Louisiana, Mississippi, Alabama and California.

1. It is plain enough that a federal "title, right, privilege or immunity" within the purview of 28 U.S.C. 1257(3) is involved in each of the claims now asserted—that the Swamp Lands Act accords conclusive force to the recital in patents issued thereunder after full survey and State selection classifying the described acreage as swamp and overflowed lands, as against the seller State's century-later effort to undo that classification; and that the State of Florida, through the decision of its Supreme Court, has violated the Due Process Clause of the Fourteenth Amendment by condoning the "taking" of petitioner's property without payment of just compensation.¹¹ Nor can it seriously be suggested that either argument is insubstantial (see pages 19-25, *infra*). To establish this Court's jurisdiction, it remains only to show that at least one of these claims was properly presented to the State courts and that the judgment sought to be reviewed is final.

a. Normally, the federal issue must be raised in the State courts before final decision or be explicitly decided by the judgment under review. But, reasonably enough,

¹¹ It need hardly be said that the test for determining the existence of a federal question for purposes of this Court's jurisdiction under Section 1257(3) of the Judicial Code is not the same as is applied to determine the jurisdiction of a federal district court under Sections 1331(a) or 1441(b). In the former instance, it is enough that the federal right or immunity have been relied upon by the petitioner to overcome a defense to the original claim, whereas, in the latter case, the federal right must be an essential ingredient of the well-pleaded complaint. See, e.g., *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 494-495 (1983); *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 675-678 (1974). Here, petitioner's title claim properly rested on deeds from the State and the federal arguments are relied upon to defeat the State's defensive plea that the recital of the deeds, and of the underlying federal surveys and patents, may be impeached and disregarded if a jury finds today that, in fact, the lands underlay navigable waters in 1845. Thus, there is no inconsistency between the remand order entered in *Mobil Oil Corp. v. Coastal Petroleum Co.*, *supra*, and the present application to this Court.

that requirement is relaxed when the right, title or immunity under federal law emerges only because "the highest state court renders an unexpected interpretation of state law or reverses its prior interpretation." *Prune-Yard Shopping Center v. Robins, supra*, 447 U.S. at 85-86 n. 9. See also *Brinkerhoff-Faris Trust Co. v. Hill*, 281 U.S. 673, 677-678 (1930). As we demonstrate in a moment, that is the situation here. Accordingly, with respect to the federal constitutional claim, it is sufficient that it was unambiguously presented to the State Supreme Court by motion for rehearing (App. G, *infra*, pp. 63a-64a), the denial of which must be deemed a rejection of the argument, even though no opinion was issued. E.g., *Great Northern R. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 366-367 (1932); *Brinkerhoff-Faris Trust Co. v. Hill, supra*; *Ohio ex rel. Bryant v. Akron Park District*, 281 U.S. 74, 79 (1930). But it is, of course, so much the better that the federal constitutional point was also raised, albeit in a minor key, in a pre-decisional brief in the Florida Supreme Court.

It is perhaps less clear that the federal statutory argument noted as the first Question Presented was fleshed out in the courts below as well as it might have been. Here we must rely on the citation—both in a trial court memorandum supporting the motion for summary judgment and in a brief to the Florida Supreme Court—of decisions of this Court and the correct description of them as barring later impeachment of the action of the Secretary of the Interior in approving surveys and issuing patents under the Swamp Lands Act which defined the acreage involved as swamp and overflowed lands. We believe this satisfies the requirement. But even if we failed to state our reliance on the 1850 Act of Congress with sufficient clarity, this Court remains free to consider the statutory point. The rule is well settled that, once jurisdiction attaches because of a properly presented federal question, the Court may notice any other federal

ground of decision disclosed by the record—even when the petitioner does not advance it. *E.g., Oregon ex rel. State Land Board v. Corvallis Sand and Gravel Co., supra*, 429 U.S. at 363 n. 3, and 384-385 (Marshall, J., dissenting); *Wood v. Georgia*, 450 U.S. 261, 264-265 n. 5 (1981). This would seem a particularly appropriate occasion to exercise that discretion since disposition of the case under the Swamp Lands Act avoids a complex constitutional question of unusual gravity. Cf. *Boynton v. Virginia*, 364 U.S. 454, 457 (1960).

b. We turn to the requirement of finality in Section 1257. There can be no serious doubt that the case is final with respect to the question presented under the Swamp Lands Act. After all, the whole point of that submission is that, in circumstances like those here, the federal statute *precludes* the factual trial (on “navigability” as of a century ago) ordered by the Florida Supreme Court on the ground that the Secretary’s determination based on official surveys, together with the concurrence of the State Governor and the resulting issuance of federal patents, cannot be impeached. Thus, any charge that the decision below is not final must be restricted to the *constitutional* argument.

It is true that the judgment below contemplates further proceedings on the navigability of the Peace River at statehood and, if an affirmative answer is given, the location of the ordinary higher water mark, and that, should petitioner prevail on those matters, the “taking” question may be mooted. But we are surely justified in asserting that petitioner’s security of title, immune from re-assessment at the behest of the State, is itself constitutionally protected property that has already been taken without compensation. At the least, the undeniable consequence of the Florida Supreme Court’s decision is that today petitioner has no clear and marketable title of a value equal to that it enjoyed before that ruling.

At all events, the remaining issues are not ones that would commend themselves to this Court for review. Cf. *Block v. North Dakota*, 461 U.S. 273, 292 & n.29 (1983). If we put the Swamp Lands Act argument to one side, the Court would only intervene to settle the very general and important constitutional question whether States may circumvent the obligation to pay just compensation when taking private property by obtaining a belated judicial declaration that the property had never really left the public domain. The decision below on this point has already clouded land titles throughout Florida and, potentially, in many other States, and would continue to do so even if petitioner were ultimately to prevail on remand in this case. Indeed, unless the Court intercedes, this insecurity may persist indefinitely for many landowners, given the uniquely burdensome and protracted character of the litigation that will be needed to resolve the issues now re-opened.

In these circumstances, we submit the present case fully qualifies as a final decision within the fourth category noted in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 482-483 (1975), as one in which "reversal of the state court on the federal issue would be preclusive of any further litigation" and "a refusal immediately to review the state court decision might seriously erode federal policy." Under a Constitutional regime that protects private property from confiscation, it must be a matter of national concern when a State court suddenly, but unambiguously, announces that all land titles embracing what may once have been the bed of a stream, no matter how venerable, are now suspended until it is redetermined whether or not the stream was navigable a century and a half ago.¹²

¹² This is not a case like *Ariyoshi v. Robinson*, *supra*, in which it appears the Hawaii Supreme Court had, in answering questions certified by the Ninth Circuit, so attenuated its recent ruling that this Court was left in doubt whether the "taking" issue was ripe for determination. See Brief for the United States as Amicus

2. Of course, we must still show, at least in outline, that petitioner did hold an unimpeachable title to the land in dispute—as a matter of federal law or state law, according as our submission rests on the Swamp Lands Act or on the Due Process Clause of the Fourteenth Amendment. We first summarize the statutory argument.

In essence, our suggestion is that the Congress that enacted the Swamp Lands Act of 1850—no less than when it wrote the Act of March 3, 1851, recently considered in *Summa Corporation*—intended the determinations ultimately made in the proceedings mandated by the statute to be conclusive against later challenge by the State.¹³ Decisions of this Court long ago established the general principle that the classification of land as swamp and overflowed through a determination of the Secretary of the Interior and the issuance of federal patents under the Act is unimpeachable because the Act “devolved upon the Secretary * * * the duty, and conferred on him the power of determining what lands were

Curiae in No. 85-405 at 6-8, 9-19. Here, the Florida Supreme Court has been perfectly clear in declaring that no rule of finality or principle of estoppel by deed or statutory bar protects any land title against a State claim that its deed was improvidently granted to encompass the bed of a navigable waterbody, which claim may be pursued at any time at an evidentiary trial.

¹³ This petition does not call into question the State's power legislatively to reclassify lands received from the federal government *before* the land is conveyed into private ownership. See *Mobil Oil Corp. v. Coastal Petroleum Co.*, *supra*, 671 F.2d at 424. Nor do we deny that private lands whose pedigree traces back to the Swamp Lands Act are subject to State legislation “so far as that legislation is consistent with the admission that the title passed and vested according to the laws of the United States.” *Corvallis*, *supra*, 429 U.S. at 377. What is questioned here is the power of a State court to permit an *ad hoc* judicial reclassification of land after the State has deeded it into private ownership, in direct repudiation of contrary determinations made concurrently by federal and State officials acting under authority of a federal statute.

of the description granted * * * and made his office the tribunal whose decision on that subject was to be controlling." *French v. Fyan, supra*, 93 U.S. at 171. See also *McCormick v. Hayes*, 159 U.S. 332, 348 (1895) (private grantee of Railroad Land Grant Act lands held to enjoy "rights secured by the laws * * * of the United States" against competing claim that lands were of a different character). Here, as we have detailed (pp. 6-8, *supra*), there were unambiguous surveys and concurrent action by the Secretary of the Interior and the Governor of Florida leading to the issuance of federal patents. The only question, then, is whether the same rule of finality obtains when the challenging party is the State itself, claiming the lands as "sovereign" navigable water bottoms which it previously owned and which the United States was therefore incompetent to convey after statehood, under the Swamp Lands Act or any other statute. Cf. *Borax Consolidated, Ltd. v. Los Angeles*, 296 U.S. 10, 15-16 (1935).

The Court's decision three terms ago in *Summa Corporation* points to the answer. It was there argued that a patent issued under the 1851 Act, although otherwise conclusive, could not preclude the State's belated assertion of a "sovereign" interest in the land. See 466 U.S. at 206 & n.4. But the Court rejected the plea for such an exception, noting that the State could have presented its claim before the patent was issued. 466 U.S. at 204 n.3, 207-209. So, here. Indeed, ours is a stronger case, since, under the scheme of the Swamp Lands Act, the State is not merely a potential intervenor, but necessarily an active participant in and beneficiary of the proceedings. This is not a situation as in *Borax*, where the United States, acting unilaterally, effectively may be disposing of the State's lands or appurtenant rights behind its back. See also *Arizona v. California*, 460 U.S. 605, 634-638 (1983). Given the State's concurrent role, it is reasonable to read the Swamp Lands Act as foreclosing belated State claims, at least when, as in the

present case, the full statutory procedures have been followed and the State then and since expressly joined in classifying the land as properly subject to disposition under the statute. As it happens, this construction is buttressed by a provision of the Submerged Lands Act of 1953, 43 U.S.C. 1301 *et seq.*, which expressly excepts from the grant of "lands beneath navigable waters" the beds of unmeandered streams that had previously been alienated. 43 U.S.C. 1301(f).¹⁴

3. Even if the Swamp Lands Act did not itself shield petitioner's title from any belated challenge that impugns the federal surveys and patents, we are clear that State law independently mandated the same result, Florida for a century having treated its own later deeds as indefeasibly vesting a valuable right of property of the kind that the federal Constitution protects against uncompensated expropriation.

We need not, at this stage, explore all the minor twists and turns of Florida's submerged land cases over the century. See, e.g., M. Rosen, *Public and Private Ownership Rights In Lands Under Navigable Waters: The Governmental/Proprietary Distinction*, 34 U. Fla. L. Rev. 561, 580-613 (1982). For present purposes, it is sufficient to note that, until this most recent decision, Florida —like most jurisdictions—accorded conclusive force to the recital in government deeds as to the classification of land and, at least after the passage of substantial time, barred any attempt at impeachment by the grantor except only in truly extraordinary circumstances. As summarized in one of the leading cases, the rule was that "the title and ownership of . . . land . . . should rest upon a grant, and not upon an evidentiary fact."

¹⁴ It is arguable that this statutory declaration is dispositive as "the rule of decision" provided by Congress for resolution of the federal question what are navigable water bottoms for the purpose of the Equal Footing Doctrine. Cf. *California, ex rel. Lands Comm'n v. United States*, *supra*, 457 U.S. at 279-281, 283-284.

Pembroke v. Peninsular Terminal Co., 108 Fla. 46, 146 So. 249, 257 (1933). This basic proposition was bolstered, if need be, by the familiar doctrine of legal estoppel and by statutes of repose like the Florida Marketable Record Title Act (712.01 *et seq.*, Fla. Stat.). And, contrary to what is now suggested, there is no doubt that those principles were deemed fully applicable by the Florida Supreme Court against a claim that the conveyance erroneously included inalienable "sovereignty lands." See, e.g., *Pembroke v. Peninsular Terminal Co.*, *supra*; *Board of Trustees of Internal Improvement Fund v. Lobeau*, 127 So.2d 98 (1961); *Odom v. Deltona Corp.*, 341 So.2d 977 (1976). See also *Trustees of the Internal Improvement Fund v. Wetstone*, 222 So.2d 10 (1969); *Trustees of the Internal Improvement Fund v. Claughton*, 86 So.2d 775 (1956).

There were, to be sure, exceptions—as with all rules. And, as sometimes happens even with judges, these exceptions have been written overbroadly. But, if we attend to the facts, it is not difficult to explain the only four cases cited in these proceedings (which safely may be taken to have overlooked no relevant Florida decision) as permitting a Swamp Lands Act deed to be impeached.

In three of the cases, the lands had not been surveyed before conveyance and it was therefore unfair to assume that navigable waters within the description were intended to be encompassed. See, *State ex rel. Ellis v. Gerbing*, 56 Fla. 603, 47 So. 353 (1908) (the Amelia River, part of the Florida Intracoastal Waterway); *Martin v. Busch*, 93 Fla. 535, 112 So. 274 (1927) (Lake Okeechobee); *Pierce v. Warren*, 47 So.2d 857 (Fla. 1950), cert. denied, 341 U.S. 914 (1951) (Biscayne Bay). In the other case, decided in 1909, not long after the deed, the court was dealing with an obviously navigable body of water which had been meandered and which the grantee therefore could not suppose to have been included in a swamp and overflowed land conveyance. See

Broward v. Mabry, 58 Fla. 398, 50 So. 826 (1909) (Lake Jackson). In fact, the court was dealing with large and plainly navigable waterbodies in each of the other decisions as well. These, then, are no more than illustrations of the quite usual caveat that apparent fraud or gross error, or genuine ambiguity as to the boundaries of the conveyance, will permit going behind a deed, which in all other circumstances is unimpeachable. Cf. *Jeems Bayou Fishing and Hunting Club v. United States*, 260 U.S. 561 (1923); *Stewart v. United States*, 316 U.S. 354 (1942). No one has suggested that the present case is within that narrow exception.

4. In the decision sought to be reviewed, the Florida Supreme Court contradicts what has just been said about the prior State law. Until and unless that court, or the Florida legislature, restores the *status quo ante*, that judgment is binding as a declaration of State law for the future. But, notwithstanding the confident, even casual, tone of the opinion and the pretence that no precedents are overruled, it is for *this* Court to determine whether the Florida tribunal has made new law in such a way as to work a taking of vested property rights. *Demorest v. City Bank Co.*, 321 U.S. 36, 42-43 (1944); *Hughes v. Washington*, *supra*, 389 U.S. at 296-297 (1968) (Stewart, J., concurring). If we have correctly summarized the law of Florida before 1986, it necessarily follows that the present decision permits the confiscation of valuable land without payment. The only possible question remaining is whether this result passes federal constitutional muster because accomplished by *judicial fiat*, rather than legislative or executive action. The answer, it seems to us, is not in doubt.

We appreciate that a federal court, even this Court, must be especially hesitant to declare that a State judicial decree, defining State law, violates the Constitution. Cf. *Demorest v. City Bank Co.*, *supra*, 321 U.S. at 42-43. Yet, the Court has long ago settled that State judicial

action is subject to constitutional scrutiny. *E.g., Ex Parte Virginia*, 100 U.S. 339 (1880); *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976). See *Pulliam v. Allen*, 466 U.S. 522, 536-545 (1984). In a variety of contexts, moreover, the decision of a State court has been reviewed here to determine whether it has made such an arbitrary or unpredictable declaration of local law as to deny due process or otherwise deprive the petitioner of a federal right. *E.g., Ward v. Love County*, 253 U.S. 17 (1920); *Georgia Ry. & Power Co. v. Decatur*, 262 U.S. 432, 438 (1923); *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95 (1938); *Demorest v. City Bank Co.*, *supra*; *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 457-458 (1958); *NAACP v. Alabama*, 377 U.S. 288, 293-302 (1964); *Bouie v. City of Columbia*, 378 U.S. 347-355, 362 (1964). Indeed, in *Muhlker v. Harlem R.R. Co.*, 197 U.S. 544, 570 (1905), the Court struck down a State court judgment expressly on the ground that it effected an uncompensated taking of property. And, as already noted, the principle was espoused in Justice Stewart's concurring opinion in *Hughes v. Washington*, *supra*.

Accepting that such a disposition is justified only in extreme cases, we submit this is an appropriate occasion—assuming the Court concludes that it cannot rest decision on the Swamp Lands Act. Surely, there must be few more egregious examples of confiscation by judicial reinterpretation of the law, and none on such a grand scale. As the Florida Supreme Court itself said only a decade ago, in an almost identical case (now “narrowed” away to rob it of all precedential force), if the State wishes to recapture water bottoms improvidently alienated in the last century, let it be done openly, by the constitutional process of eminent domain, accompanied by payment of just compensation. See *Odom v. Deltona Corp.*, *supra*, 341 So.2d at 987-989. The State legislature has not attempted any short cut, obviously

recognizing the constitutional obstacle.¹⁵ Resort to the State courts to reach the same end cannot be allowed to succeed.

CONCLUSION

For the reasons stated, certiorari should be granted to review the decision of the Florida Supreme Court.

Respectfully submitted.

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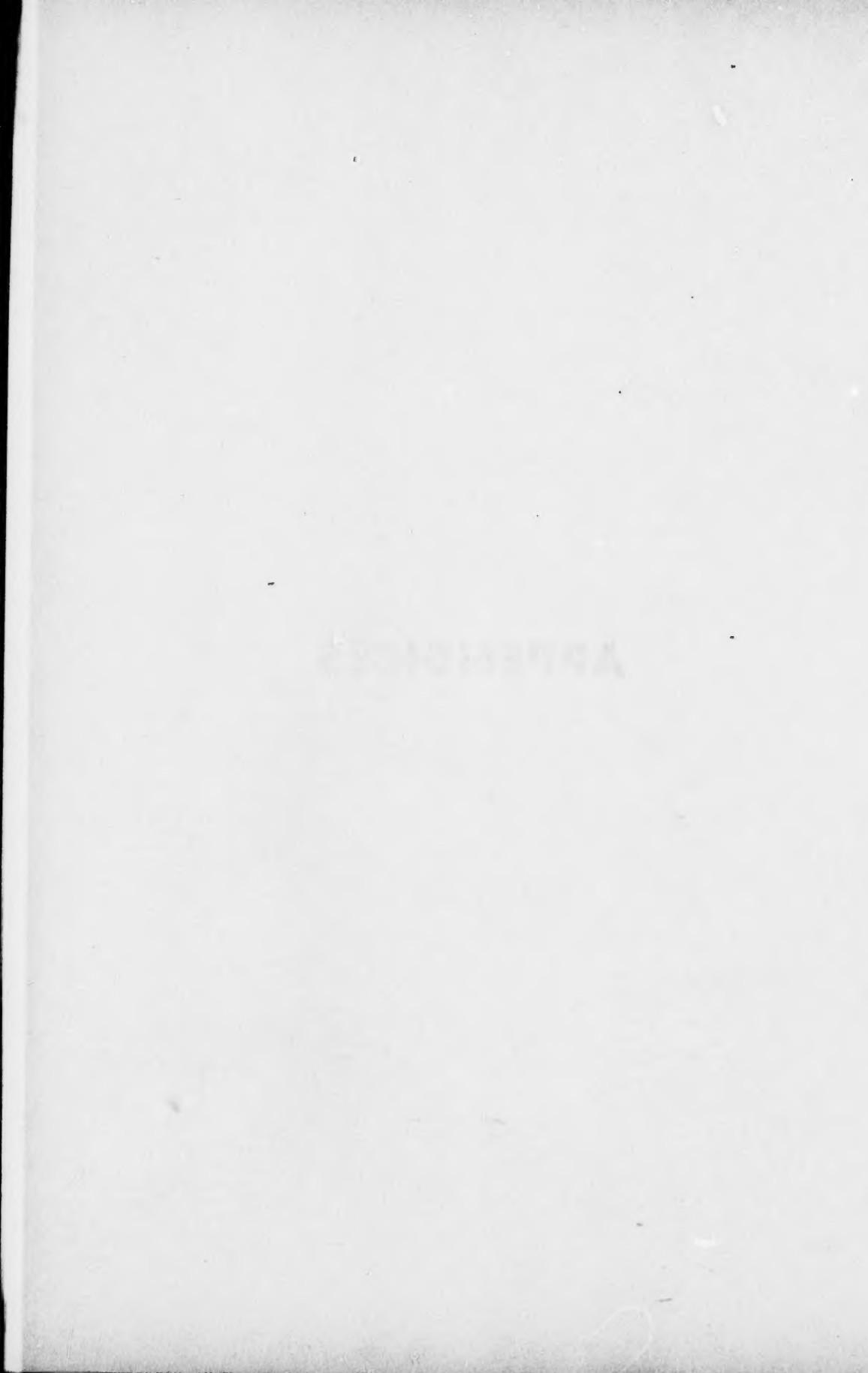
Mobil Oil Corporation

NOVEMBER 1986

¹⁵ Thus, in 1978, when the Marketable Record Title Act was amended to exempt so-called "sovereignty lands", (§ 712.03(7) Fla. Stats.), the legislature declined to make the amendment expressly retroactive.



APPENDICES



APPENDIX A

SUPREME COURT OF FLORIDA

Nos. 65696, 65755 and 65913

COASTAL PETROLEUM COMPANY,
Petitioner,
v.

AMERICAN CYANIMID COMPANY, *et al.*,
Respondents.

BOARD OF TRUSTEES OF THE INTERNAL
IMPROVEMENT TRUST FUND OF THE STATE OF FLORIDA,
Petitioner,
v.

AMERICAN CYANAMID COMPANY, *et al.*,
Respondents.

BOARD OF TRUSTEES OF THE INTERNAL
IMPROVEMENT TRUST FUND OF THE STATE OF FLORIDA,
Petitioner,
v.

MOBIL OIL CORPORATION,
Respondent.

May 15, 1986

Rehearing Denied August 27, 1986

SHAW, Justice.

These consolidated cases are before us on petitions to review decisions of the Second District Court of Appeal reported as *Coastal Petroleum Co. v. American Cyanamid Co.*, 454 So.2d 6 (Fla. 2d DCA 1984), and *Board of Trustees of the Internal Improvement Trust Fund v. Mobil Oil Corp.*, 455 So.2d 412 (Fla. 2d DCA 1984), in which the following questions were certified as being of great public importance:

- I. Do the 1883 swamp and overflowed lands deeds issued by the trustees include sovereignty lands below the ordinary high-water mark of navigable rivers?
- II. Does the doctrine of legal estoppel or estoppel by deed apply to 1883 swamp and overflowed deeds barring the trustees' assertion of title to sovereignty lands?
- III. Does the marketable record title act, chapter 712, Florida Statutes, operate to divest the trustees of title to sovereignty lands below the ordinary high-water mark of navigable rivers?

American Cyanamid Co., 454 So.2d 6, 9-10. We have jurisdiction pursuant to article V, section 3(b)(4), Florida Constitution, and answer all three questions in the negative.

In 1982 and 1983, respondents filed separate quiet title actions in Polk County Circuit Court against petitioners claiming fee simple title to portions of the beds of the Peace and Alafia rivers. In each case, petitioners moved to dismiss the suits to quiet title based on *Mobil v. Garden Street Management Corp.*, 397 So.2d 920 (Fla. 1981). The trial court denied the motions. Respondents then moved for summary judgments in their respective cases. The trial court granted said motions.

The Second District Court of Appeal affirmed the summary judgments in separate opinions filed on July 13, 1984. 454 So.2d 6; 455 So.2d 412. In *American Cyanamid*, the district court held that under section 197.228 (2), Florida Statutes (1981), this state's unconditional conveyance of land to private individuals without reservation of public rights contemplated a finding that the land is not sovereignty land; that the Trustees were barred from asserting a sovereignty title claim by the doctrine of legal estoppel; and, that Florida's Marketable Record Title Act barred any otherwise valid sovereignty title claim. 454 So.2d at 8, 9. Recognizing, however, the significant impact of its decision on the riverbeds at issue, the district court certified to this Court the aforementioned three questions as being of great public importance. *Id.*

In *Mobil Oil*, the district court held that the Polk County Circuit Court did not err in denying petitioner Trustees' motion in the alternative because the Leon County Circuit Court lacked jurisdiction over the subject matter of respondent Mobil's reply counterclaim for the reason that the counterclaim is *in rem* in nature and local to Polk County Circuit Court. 455 So.2d at 416. The district court further noted that the substantive issues raised by petitioner Trustees were decided adversely to the Trustees in *American Cyanamid*. *Id.* By order of September 4, 1984, the district court certified to this Court the same three questions certified in *American Cyanamid*.

The first certified question is premised on the uncontested legal proposition that Florida received title to all lands beneath navigable waters, up to the ordinary high water mark, as an incident of sovereignty, when it became a state in 1845. No patents or surveys were required to delineate the boundaries of such sovereignty lands and title vested in the state to be held as a public trust. Thereafter, the federal government did not hold

title to such sovereignty lands and had no power to convey them to either the state or other parties. Moreover, any surveys run by the federal government establishing meander lines were not conclusive against the state as the boundary lines between state sovereignty lands and federal uplands. *Borax Consolidated Ltd. v. City of Los Angeles*, 296 U.S. 10, 56 S.Ct. 23, 80 L.Ed. 9 (1935); *Martin v. Busch*, 93 Fla. 535, 112 So. 274 (1927).¹

In contrast to state sovereignty lands, the title to non-navigable swamp and overflowed lands, and other federal uplands, continued to reside in the federal government after 1845. However, in the 1850s, Congress exercised its power by conveying swamp and overflow uplands to the state. Surveys were conducted and patents issued whereby Florida received approximately twenty million acres of such lands. It is important to recognize that Congress had no intent or power to convey state sovereignty lands through such acts or patents and that land surveys conducted in connection with these conveyances of swamp and overflowed lands are not conclusive against the state as to the meandered boundaries of state sovereignty lands. See *Borax Consolidated, Ltd.*, 296

¹ A meander line creates a rebuttable presumption of navigability but is not necessarily a boundary line unless it is expressly made one of the calls of the boundary. However,

where a meander line is run under State authority for the purpose of identifying, locating and establishing the true line of ordinary high water mark of a body of navigable water, and the lands below high water mark are sovereignty lands, and the lands above high water mark are swamp and overflowed lands or other uplands subject to ordinary private ownership, in such case the meander line, if so intended and if duly and fairly ascertained and established, becomes, and, unless duly impeached, continues to be, a boundary line limiting the extent of conveyances of the adjacent uplands or of permissible grants or conveyances of the sovereignty lands below ordinary high water mark.

U.S. at 16, 56 S.Ct. at 26, citing to and relying on *Donnelly v. United States*, 228 U.S. 243, 33 S.Ct. 449, 57 L.Ed 820 (1913); *Mobile Transportation Co. v. City of Mobile*, 187 U.S. 479, 23 S.Ct. 170, 47 L.Ed. 266 (1903); *Shively v. Bowlby*, 152 U.S. 1, 14 S.Ct. 548, 38 L.Ed. 331 (1894); *Goodtitle ex dem. Pollard v. Kibbe*, 50 U.S. (9 How.) 471, 13 L.Ed. 220 (1850); and *Pollard v. Hagan*, 44 U.S. (3 How.) 212, 11 L.Ed. 565 (1845). The title to swamp and overflowed lands which Florida received in the 1850s and thereafter was vested in the Board of Trustees for the Internal Improvement Fund of Florida by the legislature. The title to sovereignty lands at this point remained in the legislature as a public trust. *Illinois Central Railroad v. Illinois*, 146 U.S. 387, 13 S.Ct. 110, 36 L.Ed. 1018 (1892); *Broward v. Mabry*, 58 Fla. 298, 50 So. 826 (1909); *State v. Black River Phosphate Co.*, 32 Fla. 82, 13 So. 640 (1893). These lands differ from other state lands. Sovereignty lands are for public use, "not for the purpose of sale or conversion into other values, or reduction into several or individual ownership." *State v. Gerbing*, 56 Fla. 603, 608, 47 So. 353, 355 (1908). Even after title to sovereignty lands was subsequently assigned to the Trustees, their authority to dispose of the land was rigidly circumscribed by court decisions and was separate and distinct from their authority to dispose of swamp and overflowed lands.² We answered the first certified question in the negative when we held in *Martin*, 93 Fla. at 573, 112 So. at 286-87 that:

The State Trustee defendants cannot, by allegation, averment or admission in pleadings or otherwise affect the legal status of or the State's title to sovereignty, swamp and overflowed or other lands held

² See discussion and cases cited in Comment, *Unfinished Business—Protecting Public Rights to State Lands From Being Lost Under Florida's Marketable Record Title Act*, 13 Fla.St.U.L.Rev. 599, 606-08 (1985).

by the Trustees under different statutes for distinct and definite State purposes The subsequent vesting of title to sovereignty lands in the Trustees for State purposes under the Acts of 1919 or other statutes does not make the title to sovereignty land inure to claimants under a previous conveyance of swamp and overflowed lands by the State Trustees who then had no authority to convey such sovereignty lands and did not attempt or intend to convey sovereignty lands.

Further,

[i]f by mistake or otherwise sales or conveyances are made by the Trustees of the Internal Improvement Fund of sovereignty lands, such as lands under navigable waters in the State or tide lands, or if such Trustees make sales and conveyances of State School lands, as and for swamp and overflowed lands, under the authority given such Trustees to convey swamp and overflowed lands, such sales and conveyances are ineffectual for lack of authority from the state.

Id. at 569, 112 So. at 285 (citations omitted).

The court below relied in part on the provisions of section 197.228(2), Florida Statutes (1981), which provides:

(2) Navigable waters in this state shall not be held to extend to any permanent or transient waters in the form of so-called lakes, ponds, swamps or overflowed lands, lying over and upon areas which have heretofore been conveyed to private individuals by the United States or by the state without reservation of public rights in and to said waters.

We do not agree that this section is pertinent to the issues at hand. We are dealing with navigable rivers not "so-called lakes, ponds, swamps, or overflowed lands." We are not persuaded that the legislature intended by

this statute to divest the state of title to navigable waters which were not, or could not be, conveyed to private owners. To accept this position would mean, inter alia, that if a navigable river gradually and imperceptively changed its course onto previously conveyed lands, the navigable river would become private property and the public would retain the dry river bed. The high and low water marks of navigable waters change over time, but these natural changes do not divest the public of ownership of the navigable waters. *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313, 94 S.Ct. 517, 38 L.Ed.2d 526 (1973); *Municipal Liquidators, Inc. v. Tench*, 153 So.2d 728 (Fla. 2d DCA), cert. denied, 157 So.2d 817 (Fla. 1963).

The second certified question pertains to the effect of the Trustees' later acquisition of legal title to sovereignty lands encompassed within previously conveyed swamp and overflowed lands. This question was also addressed and answered in *Martin*, as the quotations above show. Not only is there no legal estoppel to the Trustees' claim of ownership in sovereignty lands, but the Trustees are prohibited by case law from surrendering state title to sovereignty lands based on a prior conveyance of swamp and overflowed lands. Sovereignty lands cannot be conveyed without clear intent and authority, and conveyances, where authorized and intended, must retain public use of the waters. *Martin, Mabry*. The fact that a deed of swamp and overflowed lands does not explicitly exempt sovereignty lands from the conveyance does not show that the Trustees intended to convey sovereignty lands encompassed within the swamp and overflowed lands being conveyed. Further, because grantees of swamp and overflowed lands took with notice that such grants did not convey sovereignty lands, neither they nor their successors have any moral or legal claim to these lands. *Martin*, 93 Fla. at 569-73, 112 So. at 285-87.

The final certified question is whether the Marketable Record Title Act (MRTA), chapter 712, Florida Statutes,

operates to divest the state of title to sovereignty lands. Respondents and the courts below rely on *Odom v. Deltona Corp.*, 341 So.2d 977 (Fla.1976), for the proposition that the state's title to navigable water beds previously conveyed as swamp and overflowed lands is extinguished by MRTA. This reliance is misplaced. In *Odom* we rejected the state's argument that the notice of navigability concept applied to the grantees of swamp and overflowed lands under certain trustees' deeds because "it seems absurd to apply this test to small, non-meandered lakes and ponds of less than 140 acres and, in many cases, less than 50 acres in surface." *Id.* at 988. The ground on which *Odom* rests is this factual determination that the small lakes and ponds at issue were non-navigable, non-sovereignty lands. Unfortunately, even though this factual determination controlled and resolved the case, we went on to answer irrelevant arguments put to us by the parties and in answering one such argument concluded that MRTA was applicable to sovereignty lands encompassed within conveyances of swamp and overflowed land and that the claims of trustees "to beds underlying navigable waters previously conveyed are extinguished by the Act." *Id.* at 989. The statements concerning the effect of MRTA on navigable waterbeds were dicta and are non-binding in the instant case inasmuch as there were no navigable waterbeds at issue in *Odom*. See *Askew v. Sonson*, 409 So.2d 7 (Fla. 1981), where we requested and received briefs on the effect of MRTA on sovereignty lands. On reflection, and citing *Odom*, we declined to rule "on the question of whether a private owner's title to what had been sovereignty lands could be perfected by MRTA prior to the effective date of the 1978 amendment." *Id.* at 9. See also *City of Miami v. St. Joe Paper Co.*, 364 So.2d 439, 445, 449 (Fla.1978), appeal dismissed, 441 U.S. 939, 99 S.Ct. 2153, 60 L.Ed.2d 1040 (1979).

The issue of whether MRTA is applicable to sovereignty lands is squarely presented here. The issue has

two prongs. The first is whether the legislature intended to overturn the well-established law that prior conveyances to private interests did not convey sovereignty lands encompassed within swamp and overflowed lands being conveyed. We must assume that the legislature knew this well-established law when it enacted MRTA. We are persuaded that had the legislature intended to revoke the public trust doctrine by making MRTA applicable to sovereignty lands, it would have, by special reference to sovereignty lands, given some indication that it recognized the epochal nature of such revocation. We see nothing in the act itself or the legislative history presented to us suggesting that the legislature intended to casually dispose of irreplaceable public assets. The legislative purpose of simplifying and facilitating land title transactions does not require that the title to navigable waters be vested in private interests. Because we conclude that the legislature did not intend to make MRTA applicable to sovereignty lands, we do not address the second prong of whether the legislature could constitutionally make such an *ex post facto* divestment of sovereignty lands without explicitly basing it on the public interest. We note, however, although article X, section 11 of the Florida Constitution was adopted after the passage of MRTA, that section 11 is largely a constitutional codification of the public trust doctrine contained in our case law.

Finally, we agree with the district court in *Mobil Oil* that respondent Mobil's counterclaim was *in rem* in nature and local only to Polk County Circuit Court.

In summary, we hold that conveyances of swamp and overflowed lands do not convey sovereignty lands encompassed therein, that such conveyances without exemption of sovereignty lands do not legally estop the state from asserting title to sovereignty lands, and that MRTA, as originally enacted and subsequently amended in 1978, is not applicable to sovereignty lands.

We approve that portion of *Mobil Oil* holding that jurisdiction rested in Polk County and quash the remainder. We quash entirely *Coastal Petroleum v. American Cyanamid*. The cases are remanded for further proceeding consistent with this opinion.

It is so ordered.

ADKINS, OVERTON and EHRLICH, JJ., concur.

BOYD, C.J., dissents with an opinion, in which McDONALD, concurs in part and dissents in part with an opinion.

Not final until time expires to file rehearing motion and, if filed, determined.

BOYD, Chief Justice, dissenting.

Because I find that the circuit court and the district court were correct in their resolution of these quiet-title lawsuits, I must respectfully dissent. I can find no basis for holding that the deeds to the lands in question in these cases, which were duly executed by authorized public officials over one hundred years ago, may now be called into question under the public-trust doctrine or any other theory. I would approve the decisions of the district court of appeal.

The petitioners argue that the lands at issue in these quiet title actions, or some portions of them, lie below the high water marks of and thus constitute parts of the beds of certain rivers and streams that are in fact navigable and are therefore the property of the state by virtue of the public trust doctrine. The petitioners assert that the Trustees of the Internal Improvement Fund did not have authority to alienate lands underlying the waters of inland rivers and streams at the time of the execution of the Trustees' deeds forming the origins of the chains of title under which the various respondents claim ownership of the lands in question.

The essential fact upon which this case turns is that the lands were conveyed into private ownership without

reservation of those portions underlying navigable waters. The legal descriptions in the deeds constituting the origins of the chains of title under which the respondents claim encompassed the lands in question. These deeds described the property to be conveyed by reference to the official government survey. These government surveys were made for the purpose of determining the proper classification of public lands in Florida, including a determination of what lands were swamp and overflowed lands and where navigable rivers and other bodies of water were located. The official surveys made in Florida were used by state and federal land officials as the basis for selecting the parcels to be patented to the state by the United States government as swamp and overflowed lands. *South Florida Farms Co. v. Goodno*, 84 Fla. 532, 94 So. 672 (1922). The original United States government surveyors were instructed to locate and meander all navigable rivers and other bodies of water. *Lopez v. Smith*, 145 So.2d 509 (Fla. 2d DCA 1962). The official surveys containing no meandering showing navigable rivers, the federal patents issued pursuant to congressional authorization under the Swamp and Overflowed Lands Act of 1850, the official state requests for such patents, and the Trustees' deeds of the lands in question as swamp and overflowed lands, taken together, constitute official, contemporaneous determinations that the lands in question were swamp and overflowed lands and that any waters lying thereon were not navigable. The Trustees' determination that land is of a character that gives them the authority to sell it is not subject to collateral attack. *Pembroke v. Peninsular Terminal Co.*, 108 Fla. 46, 146 So. 249 (1933).

The cases upon which the petitioners place their principal reliance are *Martin v. Busch*, 93 Fla. 535, 112 So. 274 (1927); *Broward v. Mabry*, 58 Fla. 398, 50 So. 826 (1909); and *State ex rel. Ellis v. Gerbing*, 56 Fla. 603, 47 So. 353 (1908). However, many of the principles

of law stated in these cases have been modified or at least qualified by later decisions. Moreover, these cases are factually distinguishable from the present case.¹ At the least it can readily be said that none of these cases supports the proposition that land underlying a navigable river or stream simply cannot, as a matter of law, be conveyed into private ownership. To the contrary, the cited cases recognize that such lands, notwithstanding the fact that the state may have obtained title by virtue of its sovereignty, may be conveyed when the authority and intention to do so are clear. As has already been shown, there was authority and intent to convey the lands in question.

Numerous cases recognize that the state may convey the title to submerged sovereignty lands into private ownership, so long as the public trust safeguarding the rights of the public to the use and benefit of the waters is not violated. *See, e.g., Gies v. Fischer*, 146 So.2d 361 (Fla.1962); *Holland v. Fort Pierce Financing & Construction Co.*, 157 Fla. 649, 27 So.2d 76 (1946); *Pembroke v. Peninsular Terminal Co.*, 108 Fla. 46, 146 So. 249 (1933); *Tampa N.R.R. v. City of Tampa*, 104 Fla. 481, 140 So. 311 (1932); *State ex rel. Buford v. City of Tampa*, 88 Fla. 196, 102 So. 336 (1924). The right of the public to the use of the water is the inalienable portion of sovereign ownership under the public trust doctrine. Florida law has long recognized that it is not necessary for the state to retain absolute ownership of the bed of a river in order to retain the control of the use of the surface waters for the benefit of the public.

The petitioners argue that the trial court should have allowed them to present evidence that the lands in question are under waters that were in fact navigable at the

¹ An obvious distinction is that the most recent of the cited cases was decided nearly sixty years ago. None of these cases involved nearly one hundred years of state acquiescence in a private person's exercise of ownership rights over the lands in question.

time of the original deeds from the state. Such evidence, they argue, would overcome the presumption of non-navigability arising from the lack of meandering in the survey. The fact of navigability at that time, they argue, would establish that the trustees had no authority to deed the river beds and would establish the sovereignty land reservation which they say exists as a matter of law. However, summary judgment without receiving such evidence was proper.

The title to land should rest upon a grant, not upon an evidentiary fact. *Pembroke v. Peninsular Terminal Co.* As I have stated above, the Trustees in making the deeds from which the respondents' titles derive made official determinations of the character of the lands and those determinations are not now subject to question. The petitioners have cited the noted treatise by Dean Maloney and others² for the proposition that the early official surveyors encountered difficulties which may account for the lack of meandering of rivers later known to be navigable in fact. Actually, the cited work offered this historical observation as a possible explanation for the fact that so many of Florida's inland lakes were not shown on the surveys. It is highly unlikely that the surveyors would have allowed the problems of swampy shorelines, snakes, and other hazards to deter them from noting the presence of an obviously navigable river. Thus it is appropriate to apply the concept stated in *Odom v. Deltona Corp.*, 341 So.2d 977, 988 (Fla.1977), that we should presume that the official surveyors did their work correctly, conscientiously, and as instructed.

The majority accepts the petitioners' argument that the trial court's judgment quieting title to the lands in question in the respondents violates the public trust doctrine by divesting the public of its common-law rights to

² F. Maloney, S. Plager, and F. Baldwin, *Water Law and Administration: The Florida Experience* (1968).

the use and benefit of navigable waters. However, there is no such divestment of the public rights of use and benefit of the waters.

Contrary to the assertions of the petitioners and as discussed above with citations of authority, a determination that the bed of a river or stream is in private ownership does not divest the public of its rights in the use and benefit of the water for purposes such as transport, fishing, floating, and swimming if the river or stream is in fact useful for such purposes. When a riparian owner holds title to the land between high-water mark and the thread of the stream (or owns both banks and the bed from high-water mark to high-water mark), such title is held subject to the servitude in favor of the public to pass over the water in boats if such use of the water is possible. Moreover, the public right does not depend on the river being in fact navigable in the sense of being useful for navigation for commercial purposes. Thus, to the extent that the original Trustees' deeds are taken as a determination that the rivers were not navigable, any such determination has no effect on public rights in the waters today if the waters are now in fact useful for navigational purposes. The Trustees deeded away only the proprietary interest in the submerged land. The right to the use of the overlying waters was inalienable under the public trust doctrine. Even if a river or stream is not navigable in the commercial sense but is used or useful for lesser degrees of navigation by small vessels, such as boats, canoes, and rafts, commonly employed in the recreational uses of rivers and streams, then the public retains the right to the use of the waters for such purposes. See, e.g., *Elder v. Declour*, 364 Mo. 835, 269 S.W.2d 17 (1954).

Even were I to agree that the Trustees needed and lacked specific legislative authority to execute the deeds in question on the ground that the properties were sovereignty lands rather than swamp and overflowed lands,

I believe that the doctrine of estoppel would support the lower courts' declaration of respondents' ownership. Florida law recognizes that where a grantor conveys land by mistake, he is estopped to later deny that he intended the conveyance as expressed in the deed. This principle has been applied in a case where the Trustees not only made a mistake, but asserted that they lacked legislative authority to convey the lands in question. *Trustees of the Internal Improvement Fund v. Lobeau*, 127 So.2d. 98 (Fla.1961). See also *Trustees of the Internal Improvement Fund v. Wetstone*, 222 So.2d 10 (Fla. 1969); *Trustees of the Internal Improvement Fund v. Claughton*, 86 So.2d 775 (Fla.1956). Moreover, a deed will be held valid if the grantor, lacking authority to make the deed at the time, later acquires title or acquires the authority to alienate the property. That situation also obtains here.

The circumstances of these cases show that the doctrine of estoppel is properly applied here; these are classic cases for application of the doctrine of estoppel. The deeds were executed in 1883. At various times following that date, the respondents or their predecessors in title engaged in acts evincing the intent to exercise dominion and control over the lands in question. Some of the respondents or their predecessors in title have engaged in mining operations on the lands in question. If the Trustees disputed the respondents' title, they should have taken action to enjoin such operations and to evict the respondents long before this. The law should not come to the aid of one who is not diligent in asserting his own rights.

The respondents' "sovereignty-lands" argument fails for another reason. In 1819, the territorial legislature of Florida adopted a statute declaring the common law of England to be of force in Florida. The statute, in modified form but unchanged as to substance, is still in effect and is now codified in section 2.01, Florida Statutes (1985), and provides as follows:

The common and statute laws of England which are of a general and not a local nature, with the exception hereinafter mentioned, down to the 4th day of July, 1776, are declared to be of force in this state; provided, the said statutes and common law be not inconsistent with the Constitution and laws of the United States and the acts of the Legislature of this state.

Thus English common-law rules concerning land ownership and land transfers, as they developed up until July 4, 1776, were, have been, and continue to be the law in Florida unless and until modified by statute or court decision.

Even if we accept, as the majority does, the proposition that title to lands underlying navigable rivers was vested in the state upon admission into the Union, this does not compel acceptance of the further proposition that such lands were then inalienable under the public trust doctrine. From medieval times right on through the eighteenth century, the common law of England recognized land grants and land deeds vesting title to land underlying non-tidal but navigable rivers in private riparian owners. See *Hardin v. Jordan*, 140 U.S. 371, 11 S.Ct. 808, 35 L.Ed. 428 (1891). Therefore, at the time of Florida's admission into the Union, there was no impediment to the execution of deeds of such lands into private ownership. The fact that in other American jurisdictions, courts modified the English common law by imposing a public trust on the state's ownership of such lands, see, e.g., *Illinois Central R.R. v. Illinois*, 146 U.S. 387, 13 S.Ct. 110, 36 L.Ed. 1018 (1892), could not have affected the land law of Florida, which still followed the English common-law rules. The earliest Florida court decision the majority is able to cite in support of the existence of the public trust doctrine is *State v. Black River Phosphate Co.*, 32 Fla. 82, 13 So. 640 (1893), which was not decided until after the execution of the deeds in question in these cases.

In addition to the common-law rule allowing for grants of river bottom land to riparian owners, notice should also be taken of the effect of chapter 791, Laws of Florida (1856), in which the state expressly divested itself of and granted to riparian landowners "all right title and interest to all lands covered by water, lying in front of any tract or land . . . lying upon any navigable stream . . . as far as the edge of the channel, and hereby vest the full title to the same in and unto the riparian proprietors." Sixty-five years later, the legislature amended the statute to provide that the title would not vest unless and until such a riparian owner had filled in or permanently improved such submerged land. Ch. 8536, Laws of Fla. (1921). But in the meantime, many riparian proprietors, in reliance on the 1856 legislation, had exercised dominion and control over various lands underlying navigable waters, for purposes other than the building of wharves and so forth, as envisioned when the 1856 legislation was passed. Decisions of this Court construing the 1856 act recognized that the state could grant the proprietary interest in the submerged lands without violating the public trust for protection of public rights in the use of the waters. See, e.g., *Alden v. Pinney*, 12 Fla. 348 (1869); *Geiger v. Filor*, 8 Fla. 325 (1859).

The decisions of The Florida Supreme Court from 1856 up until 1893 demonstrate that Florida followed the English common-law rules that land under navigable tide waters was titled in the sovereign, but could be alienated subject to public rights of navigation and fishing; and that the title to land underlying navigable inland rivers could be held in private hands subject to similar public rights. See *State v. Black River Phosphate Co.*, 27 Fla. 276, 9 So. 205 (1891); *Bucki v. Cone*, 25 Fla. 1, 6 So. 160 (1889); *Sullivan v. Moreno*, 19 Fla. 200 (1882); *Rivas v. Solary*, 18 Fla. 122 (1881).

As the foregoing discussion of legal authorities shows, the suggestion that the state must hold title to all lands

underlying navigable rivers and streams in order to protect the rights of the public to the use and enjoyment of the waters is based on a misconception. As in any other areas of property law, the law recognizes various degrees of legal rights and interests in the same property and does not demand that one person hold the entire "bundle of sticks." The sovereign trust in favor of the public to use navigable waters for fishing, navigation, and recreation can be preserved inviolate even though the beds of such rivers and streams be titled in private owners.

Some of the petitioners and *amici curiae* in these cases, as well as observers in the communications media and among the public generally, have inaccurately suggested that the state must have title in order to protect wetlands from environmental damage. However, the legal proposition that parts of the lands underlying rivers or streams are in private ownership has nothing whatsoever to do with the plenary power of the legislature to regulate the use of such property for the purpose of protecting the natural environment. The scope of that regulatory authority is very broad and fully adequate to the purpose of protecting Florida's environment against harmful activities. See, e.g., *Atlantic International Investment Corp. v. State*, 478 So.2d 805 (Fla.1985); *Graham v. Estuary Properties, Inc.*, 399 So.2d 1374 (Fla.1981), cert. denied, 454 U.S. 1083, 102 S.Ct. 640, 70 L.Ed.2d 618 (1982).

Contrary to the various suggestions that the present cases pertain to issues of environmental protection, it should be made known that what these cases involve is money. If the Board of Trustees is able on remand to succeed in showing the rivers in question to have been in fact navigable in 1845, then the Board's title to the submerged lands will be confirmed. In that case the Board's leases to Coastal Petroleum may be held valid. Contrary to suggestions of ecological concern, there is no showing that if the board prevails, phosphate mining will cease. As lessee, Coastal Petroleum's only interest in

these lands is to extract mineral royalties. Thus any lingering notions that these cases concern ecology should be dispelled. These cases concern money and the question of who gets it.

Much has been written and spoken, in the communications media and elsewhere, concerning the legal issues in this case and the related political issues. Many have suggested that the courts are being asked to give away state-owned lands. The truth is that the lands in question here, as well as other lands, were legally conveyed by authorized state officials. It may very well be the case that in doing so, public officials failed to exercise care and diligence on behalf of the public. But the fact that decisions of former officials were unwise is no reason to now penalize innocent purchasers who paid market value and relied upon state officers' authority to sell. I can see no constitutionally permissible basis for the state to recover such lands except by purchase or by eminent domain based on a public purpose and the payment of just compensation.

There has also been much public discussion of the effect of the Marketable Record Title Act. I agree with the district court's holding that MRTA applies with the same force to land claims of the state as to those of private claimants. The law was intended to apply and should apply to all real estate claims without an exception for those of the state. Under MRTA, the claims of the state in these cases are asserted too late and cannot be revived. If private claimants were to seek to call into question the deeds of an ancestor given over one hundred years ago, based on mistakes, reservations or infirmities not preserved by re-recording under the statute, such claims would be barred under MRTA. The same rule should apply against the state because of the overriding interest in the stability and marketability of land titles.

Constitutional protection of private property rights is an essential feature of our form of government and our

society. Whenever the awesome power of government is used to extract from people their lives, liberties, or property, their only refuge is in the courts. The circuit court orders in these cases correctly preserved the vested rights of real property owners against attempted state confiscation. The district court was in my view correct in affirming those circuit court judgments. I would approve the district court decisions. I therefore respectfully dissent.

McDONALD, J., concurs in part and dissents in part with an opinion.

McDONALD, Justice, concurring in part and dissenting in part.

I concur with Justice Boyd's dissent on all issues except to the effect of the Market Record Title Act. I do not believe it applicable to the beds of navigable rivers and streams and would not extend *Odom v. Deltona Corp.*, 341 So.2d 977 (Fla.1977) beyond the facts of that case.

APPENDIX B

SUPREME COURT OF FLORIDA
WEDNESDAY, AUGUST 27, 1986

Case No. 65,696

District Court of Appeals,
2d District—Nos. 83-1425 & 83-1478

COASTAL PETROLEUM COMPANY,
Petitioner,
v.

AMERICAN CYANAMID COMPANY, *et al.*,
Respondents.

Case No. 65,755

District Court of Appeal,
2d District—Nos. 83-1378 & 83-1413

BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT
TRUST FUND OF THE STATE OF FLORIDA,
Petitioner,
v.

AMERICAN CYANAMID COMPANY, *et al.*,
Respondents.

Case No. 65,913

District Court of Appeal,
2d District—No. 82-2050

BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT
TRUST FUND OF THE STATE OF FLORIDA,
Petitioner,
v.

MOBIL OIL CORPORATION,
Respondent.

Upon consideration of the Motions for Rehearing filed in the above causes by attorneys for AMERICAN CYANAMID COMPANY, ESTECH, INC. and MOBIL OIL CORPORATION, and responses thereto,

IT IS ORDERED that said Motions be and the same are hereby denied.

ADKINS, OVERTON, EHRLICH and SHAW, JJ., concur.

MCDONALD, C.J. and BOYD, J., dissent.

APPENDIX C

**MANDATE
SUPREME COURT OF FLORIDA**

To the Honorable, the Judges of the District Court of Appeal, Second District,

WHEREAS, in that certain cause filed in this Court styled:

COASTAL PETROLEUM Co.

v.

AMERICAN CYANAMID Co., et al.;

**BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT
TRUST FUND OF THE STATE OF FLORIDA**

v.

AMERICAN CYANAMID Co., et al.;

**BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT
TRUST FUND OF THE STATE OF FLORIDA**

v.

MOBIL OIL CORPORATION

Case No. 65,696, 65,755, 65,913
Your Case No. 83-1425, 83-1478, 83-1378,
83-1413, 82-2050

The attached opinion was rendered on May 15, 1986,

YOU ARE HEREBY COMMANDED that further proceedings be had in accordance with said opinion, the rule of this Court and the laws of the State of Florida.

WITNESS the Honorable Parker Lee McDonald, Chief Justice of the Supreme Court of Florida and the Seal of said Court at Tallahassee, the Capital, on this 27th day of August 1986.

/s/ Sid J. White
Clerk of the Supreme Court
of Florida

APPENDIX D

**DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT**

No. 82-2050

THE BOARD OF TRUSTEES OF THE INTERNAL
IMPROVEMENT TRUST FUND OF THE STATE OF FLORIDA,
Appellant,

v.

MOBIL OIL CORPORATION,

Appellee.

July 13, 1984

Rehearing Granted Sept. 4, 1984

HOBSON, Acting Chief Judge.

The Board of Trustees of the Internal Improvement Trust Fund of the State of Florida ("Trustees"), co-defendant below in a quiet title action, appeals a final summary judgment order rendered in favor of Mobil Oil Corporation ("Mobil"), plaintiff below. We affirm.

In April 1982, Mobil, a New York corporation engaged in the mining and processing of phosphate rock in Polk County, Florida, initiated an *in rem* action in the Circuit Court of the Tenth Judicial Circuit in and for Polk County against the Trustees and Coastal Petroleum Company ("Coastal"), a Florida corporation involved in

ventures in Polk County similar to those of Mobil. Mobil's complaint sought to quiet title to certain submerged lands coursed by the Peace River between Bartow and Fort Meade in Polk County. The Trustees, who are the trustees of state owned lands, submitted a motion to dismiss Mobil's complaint, or, in the alternative, to stay the proceedings. Their motion in the alternative alleged that an action involving the same parties and the same title issues was pending in the Circuit Court of the Second Judicial Circuit in and for Leon County, and that, as a result, the Leon County Circuit Court had either exclusive jurisdiction to try the title issues presented, in which case a dismissal was appropriate, or exclusive venue, in which case a stay was appropriate.

The Leon County Circuit Court case referred to in the Trustees' motion in the alternative originated several years before the Polk County Circuit Court *in rem* action. In September 1976, Mobil instituted a contract action against Coastal asserting that Coastal had violated a sublease issued to Mobil for oil and gas exploration upon lands located beneath the Peace River in Polk County. Coastal then filed a counterclaim alleging that Mobil had converted phosphate ore and other minerals from these leased, submerged lands, which Coastal contended were owned by the state. Coastal joined as a necessary party to this counterclaim the Trustees. Mobil subsequently filed a reply counterclaim against Coastal and the Trustees seeking a declaratory judgment to remove a cloud on the title to a parcel of submerged land similarly situated to the submerged lands at issue in the conversion claim.¹

Although the parcel of real estate which is the subject of Mobil's reply counterclaim in the still pending Leon County Circuit Court proceeding is not included within the submerged lands at issue in the Polk County Circuit

¹ It is unclear from the record on appeal whether Mobil's reply counterclaim was permissive or compulsory in nature.

Court quiet title action, it is similarly situated to the submerged lands at issue in the Polk County Circuit Court case. Moreover, the title issues raised in both the reply counterclaim and the quiet title action are identical.

Mobil responded to the Trustees' motion in the alternative by contending that the Polk County Circuit Court was the only court which could grant Mobil the complete relief it was seeking, *i.e.*, a binding *in rem* decree quieting the title to the submerged lands, because, in its view, the Polk County Circuit Court was the only court which had *in rem* jurisdiction to try the issue of title to the Polk County real property described in Mobil's complaint.

The Polk County Circuit Court subsequently rendered an order denying the Trustees' motion in the alternative. The same court thereafter issued a final summary judgment order in Mobil's favor which the Trustees now appeal.

Because the title issues presented by Mobil's reply counterclaim in the Leon County Circuit Court case are the same as those involved in the Polk County Circuit Court action, and because service of process was first perfected in the Leon County Circuit Court case, the Trustees basically argue on appeal from the procedural angle that the Polk County Circuit Court erred by denying their motion in the alternative. In support of their stand they cite *Mabie v. Garden Street Management Corp.*, 397 So.2d 920 (Fla. 1981), for the proposition that when separate actions addressing identical issues are pending between the same parties in courts of concurrent jurisdiction, exclusive jurisdiction to try those issues lies with the court in which service of process was first effectuated.² Mobil answers that *Mabie's* "rule of priority" is inapplicable here. It explains away *Mabie* by pointing out that, unlike the situation at bar, the separate actions

² The Trustees assert that *Mabie's* "rule of priority" is one of exclusive venue, not exclusive jurisdiction.

in *Mabie* were "transitory" in nature, as opposed to "local" in nature. Relying on *Lakeland Ideal Farm & Drainage District v. Mitchell*, 97 Fla. 890, 122 So. 516, 518-19 (1929), it maintains that the common law "local action rule" requires that its suit to quiet title to the submerged lands in issue could be brought only in Polk County, the county where the lands in question are located. It thus concludes that the Polk County Circuit Court did not err in denying the Trustees' motion in the alternative.

The Trustees construe the rule of priority's concept of "concurrent jurisdiction" to mean that in suits serving "substantially the same purpose," which they say is the situation regarding Mobil's reply counterclaim in the Leon County Circuit Court proceeding and Mobil's quiet title action in the Polk County Circuit Court case, the courts involved need not have concurrent jurisdiction over the subject matter, but need merely have concurrent jurisdiction to determine the issues. Since the Leon County Circuit Court has jurisdiction over the type of case represented by Mobil's reply counterclaim, they conclude that the Leon County Circuit Court should have been allowed to decide the title issues to the exclusion of the Polk County Circuit Court.

The Trustees' interpretation of the rule of priority's concept of concurrent jurisdiction suffers from two inter-related flaws, the second of which very probably caused the first: first, it ignores that the rule does not even come into play unless the court which initially tries to exercise jurisdiction at least has subject matter jurisdiction; second, it fails to recognize that in an *in rem* action there are two prongs to the definition of subject matter jurisdiction.

The ultimate purpose behind the rule of priority is comity; to prevent collision and conflict in the execution of judgments by independent courts of coordinate power. If the court which first attempts to exercise jurisdiction

does not have subject matter jurisdiction, it cannot be said to have concurrent jurisdiction with a court which does have subject matter jurisdiction. In such a situation, there is simply no need to invoke the rule, and, as a result, the court which does have subject matter jurisdiction is free to exercise jurisdiction and to subsequently enter a final judgment.

In *Mabie*, as well as in the various other cases cited by the Trustees where the rule of priority was employed, *Benedict v. Foster*, 300 So.2d 8, 10 (Fla. 1974), *Taylor v. Cooper*, 60 So.2d 534, 535-36 (Fla. 1952), *Ullendorff v. Brown* 156 Fla. 655, 24 So.2d 37, 39-40 (1945), *Martinez v. Martinez*, 153 Fla. 753, 15 So.2d 842 (1943), *DiProspero v. Shelby Mutual Insurance Co.*, 400 So.2d 177, 179 (Fla. 4th DCA 1981), *Royal Globe Insurance Co. v. Gehl*, 358 So.2d 228, 229 (Fla. 3d DCA 1978), *Hogan v. Millican*, 209 So.2d 716, 718 (Fla. 1st DCA 1968), and *Crosley Corp. v. Hazeltine Corp.*, 122 F.2d 925 (3d Cir. 1941), the court which first attempted to exercise jurisdiction had subject matter jurisdiction. See also *Hunt v. Ganaway*, 180 So.2d 495 (Fla. 1st DCA 1965), disapproved on other grounds, *Mabie*. More to the point, in cases involving real property where the rule was applied, the court which first tried to exercise jurisdiction had subject matter jurisdiction. See *Farmers' Loan & Trust Co. v. Lake Street Elevated Railroad Co.*, 177 U.S. 51, 20 S.Ct. 564, 44 L.Ed. 667 (1900); *Ray v. Williams Phosphate Co.*, 59 Fla. 598, 52 So. 589 (1910); *DiProspero*; *Blake v. Blake*, 172 So.2d 9 (Fla. 3d DCA 1965).

Where the cause of action is *in rem*, as is the case regarding Mobil's reply counterclaim,³ the court involved

³ "An action involves title to real estate 'only where the necessary result of the decree or judgment is that one party gains or the other loses an interest in the real estate, or where the title is so put in issue by the pleadings that the decision of the case necessarily involves the judicial determination of such rights.'" *In re Weiss'*

has subject matter jurisdiction only if it has 1) jurisdictional power to adjudicate the class of cases to which the cause belongs *and* 2) jurisdictional authority over the land which is the subject matter of the controversy. *See Lovett v. Lovett*, 93 Fla. 611, 112 So. 768, 775 (1927). Although the Leon County Circuit Court has jurisdictional authority to adjudicate the type of action represented by Mobil's reply counterclaim,⁴ it does not have jurisdictional power over the Polk County parcel of land which is the subject matter of Mobil's reply counterclaim.

Florida's constitution delegated the legislature with the mandatory responsibility of dividing the state into judicial circuits along county lines. *See Art. V, § 1, Fla. Const. (1968)*. Acting pursuant to the command of the constitution, the legislature divided the state into twenty judicial circuits along county lines. *See § 26.01, Fla.Stat. (1981)*. By the very act of providing for this type of division of the state into judicial circuits, the constitution clearly contemplated territorial limitations upon each circuit court. The geographical boundaries of a circuit court along county lines were designed and prescribed with a definite object in view—to constrict the extent of

Estate, 106 So.2d 411, 415 (Fla. 1958), quoting from *Barrs v. State ex rel. Britt*, 95 Fla. 75, 116 So. 28, 29 (1928).

⁴ A perusal of relevant statutory authority readily reveals that the Leon County Circuit Court has jurisdictional power to adjudicate the class of cases to which Mobil's reply counterclaim belongs. The circuit courts have exclusive original jurisdiction in all cases in equity and in law involving the title of real property. *See § 26.012(2)(c) and (g), Fla.Stat. (1981)*. The circuit courts also have jurisdiction to declare rights, status and other equitable or legal relations. *See § 86.011*. More specifically, any party who may be in doubt about his rights under a deed, as is Mobil, may have determined any question under such deed and obtain a declaration of rights, status or other equitable or legal relations thereunder. *See § 86.021*. In addition, further relief based on a declaratory judgment may be granted when necessary and proper upon an application by motion to the court having jurisdiction to grant relief. *See § 86.061*.

a circuit court's operation and authority. Needless to say, Leon County and Polk County are in separate judicial circuits. See § 26.021.

The local action rule in Florida is that where land lies outside a circuit court's territorial jurisdiction, and the purpose of an action is to determine the question of title to the land, as is the case regarding Mobil's reply counter-claim, the action is local to the circuit in which land lies. *Lakeland Ideal Farm & Drainage District*. See also *Georgia Casualty Co. v. O'Donnell*, 109 Fla. 290, 147 So. 267 (1933); *Largo Land Co. v. Skipper*, 98 Fla. 541, 123 So. 915 (1929); *George v. Gustinger*, 350 So.2d 574, 575 (Fla. 3d DCA 1977); *Hendry Corp. v. State Board of Trustees of the Internal Improvement Trust Fund*, 313 So.2d 453 (Fla. 2d DCA 1975).⁵

The local action rule in Florida is one of subject matter jurisdiction, not venue, although the Trustees suggest otherwise. Indeed, the rule is rooted in the second part of the *in rem* definition of subject matter jurisdiction which requires that the court have jurisdictional authority over the land which is the subject matter of the controversy. Moreover, our state supreme court remarked as follows in *Lakeland Ideal Farm & Drainage District*:

The [venue] statutes . . . affect only the venue of actions. The authority of the [venue] statutes . . . necessarily presupposes that the court in which the action is brought possesses jurisdiction of the *subject-matter* of the action as well as of the parties. Those statutes do not purport to confer generally

⁵ See also *The Northern Indiana Railroad Co. v. The Michigan Central Railroad Co.*, 15 How. (56 U.S.) 233, 14 L.Ed 674 (1853); *Massie v. Watts*, 6 Cranch (10 U.S.) 148, 3 L.Ed. 181 (1810); *Johnson v. Dunbar*, 114 N.Y.S.2d 845 (N.Y.Sup.Ct. 1852), *aff'd*, 82 A.D. 720, 122 N.Y.S.2d 222 (1953), *aff'd* 306 NY. 697, 117 N.E.2d 801 (1954).

extra-territorial jurisdiction as to subject-matter located in another county, nor to change existing rules with reference to the locality of actions which in their essential nature are local and therefore must be brought in a court having jurisdiction of the subject-matter as well as of the parties.

122 So. at 518. In *Hendry Corp.*, this court echoed the above statement in *Lakeland Ideal Farm & Drainage District* by noting that "the local action rule is itself a limitation on the statutory rule as to venue." 313 So.2d at 455.*

Since the local action rule in Florida is a rule of subject matter jurisdiction, not venue, Mobil did not "waive" the rule by submitting its reply counterclaim to the Leon County Circuit Court, because subject matter jurisdiction cannot be conferred by waiver or consent. See, e.g., *Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. State*, 295 So.2d 314 (Fla. 1st DCA 1974).

In sum, the Leon County Circuit Court lacks jurisdiction of the subject matter of Mobil's reply counterclaim for the reason that the counterclaim is *in rem* in nature and local to the Polk County Circuit Court. See *Cohen v. Century Ventures, Inc.*, 163 So.2d 799 (Fla. 2d DCA 1964). Because the Leon County Circuit Court lacks jurisdiction over the subject matter of Mobil's reply counterclaim, the rule of priority is inapplicable.⁷ Hence, the Polk County Circuit Court did not err in denying the Trustees' motion in the alternative and in proceeding to render a final judgment.

* See also *Ellenwood v. Marietta Chair Co.*, 158 U.S. 105, 15 S.Ct. 771, 30 L.Ed. 913 (1895).

⁷ We suggest that the Leon County Circuit Court notice the defect of want of jurisdiction as regards Mobil's reply counterclaim and enter an appropriate order. See *Bohlenger v. Higginbotham*, 70 So.2d 911 (Fla. 1954).

The Trustees' three remaining arguments on appeal relate to the substantive question of whether the Polk County Circuit Court erred in granting Mobil's motion for summary judgment as to the title issues. These issues, however, have been decided adversely to the Trustees in *Coastal Petroleum Co. v. American Cyanamid Co., et al.* 454 So.2d 6 (Fla. 2d DCA 1984)' (questions certified). Therefore, we do not address those questions here.

Accordingly, the final summary judgment order is affirmed.

AFFIRMED.

DANAHY and LEHAN, JJ., concur.

APPENDIX E

DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

Nos. 83-1378, 83-1413, 83-1425
and 83-1478

COASTAL PETROLEUM COMPANY, AND BOARD OF TRUSTEES
OF THE INTERNAL IMPROVEMENT TRUST FUND OF THE
STATE OF FLORIDA,

Appellants,

v.

AMERICAN CYANAMID COMPANY, a Maine Corporation,
Appellee.

and

COASTAL PETROLEUM COMPANY, AND BOARD OF TRUSTEES
OF THE INTERNAL IMPROVEMENT TRUST FUND OF THE
STATE OF FLORIDA,

Appellants,

v.

ESTECH, INC., a Delaware corporation,
Appellee.

July 13, 1984

PER CURIAM.

Coastal Petroleum Company and the Board of Trustees of the Internal Improvement Trust Fund of the State of Florida were codefendants below in separate

quiet title actions. They appeal the summary final judgments rendered in favor of American Cyanamid Company and Estech, Inc., plaintiffs below. We affirm.

In 1883 the Trustees deeded certain land in Polk County as swamp and overflowed lands to plaintiffs' predecessors in title. These lands included some areas of the riverbed of the Peace River. Plaintiffs deraigned their titles from these deeds, which contained no reservations of any right, title or interest by the Trustees. In these actions, they sought to quiet title to these lands pursuant to chapter 65, Florida Statutes (1981).

As a starting point for our discussion, it should be recalled that the State of Florida was admitted to the Union by Act of Congress approved March 3, 1845. In 1850 the United States Congress enacted the Swamp Lands Act, granting to the various states of the union swamp and overflowed lands, which were unfit for cultivation and unsold on or after September 28, 1850. 43 U.S.C. § 982 (1964) (effective September 28, 1850). In 1857 patents for the lands here involved were issued to the state pursuant to the 1850 act. Prior to issuance of these patents, the Florida General Assembly had vested the power of sale over all swamp and overflowed lands in the Trustees. Ch. 610, §§ 1 & 2, Laws of Fla. (1855).

In 1977 Coastal Petroleum filed several suits in the United States District Court in Leon County, Florida, against plaintiffs. Coastal sought to recover damages for the alleged conversion of phosphate from these lands. Coastal Petroleum claimed the lands were state owned sovereignty lands subject to a lease between it and its lessor, the Trustees, entered into in 1946. We are advised that these federal cases are now pending.

After Coastal initiated the litigation in the federal court, plaintiffs, in 1982 and 1983, filed quiet title suits in the Polk County Circuit Court seeking to confirm their ownership of the lands at issue. They also sought to re-

move the cloud created by Coastal's claim that the lands were state owned sovereignty lands subject to Coastal's lease.

Coastal moved to dismiss the suits to quiet title based on *Mabie v. Garden Street Management Corp.*, 397 So.2d 920 (Fla.1981). The trial court denied the motion. Plaintiffs then filed motions for summary judgment. The trial court granted these motions because, under the doctrine of legal estoppel, the conveyances of the lands by the United States and the State of Florida vested fee simple title in the plaintiffs. Coastal and the Trustees filed timely appeals from both summary final judgments. For purposes of oral argument, the appeals were consolidated. Since these cases involve identical issues, we address them in a single opinion.

Defendants raise several points. Initially, they assert the trial court should have dismissed the case for improper venue. This issue, however, has been decided adversely to appellants in *Board of Trustees of the Internal Improvement Trust Fund v. Mobil Oil Corp.*, 455 So.2d 412 (Fla.2d DCA 1984), so we do not address it here.

In arguing that the trial court erred in entering the judgments, the Trustees raised three substantive questions:

1. Do the 1883 swamp and overflowed lands deeds issued by the Trustees include sovereignty lands below the ordinary high-water mark of navigable rivers where the Trustees held no title to such sovereignty lands at the time of the conveyances?
2. Does the doctrine of legal estoppel or estoppel by deed apply to 1883 swamp and overflowed deeds barring the Trustees' assertion of title to sovereignty lands?
3. Does the Marketable Record Title Act, chapter 712, Florida Statutes, operate to divest the

Trustees of title to sovereignty lands below the ordinary high-water mark of navigable rivers?

In its brief, Coastal raises the additional point that the trial court erred in disposing of this litigation by summary final judgment. That point, however, is subsumed by the three substantive questions raised by the Trustees, which we now briefly discuss.

1. *The sovereignty lands issue.*

As to the first issue, the trial court rejected the Trustees' argument that the plaintiffs took title with "notice of navigability" so that the Trustees' conveyances did not include sovereignty lands. *See Odom v. Deltona Corp.*, 341 So.2d 977, 988 (Fla. 1976). The trial court observed that these lands were surveyed before they were conveyed into private ownership as swamp and overflowed lands; furthermore, no water courses on the lands were meandered by the original government surveyors. *Cf. Broward v. Mabry*, 58 Fla. 398, 50 So. 826 (1909). The court determined that when the state later conveyed such lands as swamp and overflowed lands without limitation or reservation of state owned sovereignty lands, the lands so conveyed were not subject to any "notice of navigability." Similarly, the court held the same was true when the lands were conveyed by the United States Government patent without limitation or reservation. *Cf. Pierce v. Warren*, 47 So.2d 857 (Fla. 1950), *cert. denied*, 341 U.S. 914, 71 S.Ct. 734, 95 L.Ed. 1350 (1951), and *Martin v. Busch*, 93 Fla. 535, 112 So. 274 (1927).

We agree with the above conclusions of the trial court. Section 197.228(2), Florida Statutes (1981), recognizes that this state's unconditional conveyance of land to private individuals without reservation of public rights is a contemporaneous finding that the land is not sovereignty land. Here, the Trustees conveyed the lands in question to private individuals as swamp and overflowed lands in 1883, without any reservation of rights in the

deeds. The contemporaneous findings made by the Trustees when they executed their conveyances and the decisions by the government surveyors not to meander any of these watercourses are not now open to question. Rather, at this late date, we must accept their actions as correct and accord the Trustees' conveyances the legal sanctity they deserve. See *Odom v. Deltona Corp.*, 341 So.2d at 984, 988-989.

2. *The legal estoppel question.*

While the trial judge considered each of the issues urged by the defendants, he apparently grounded the summary final judgments primarily on the principle of legal estoppel. We think the trial judge was correct in quieting the fee simple title in the plaintiffs on this basis. First, the court properly concluded that defendants are estopped from asserting any right or title in derogation of the 1883 deeds conveying swamp and overflowed lands. *Board of Trustees of the Internal Improvement Fund v. Lobeau*, 127 So.2d 98 (Fla. 1961) (legal estoppel is determined by the intentions of the parties as expressed in the ~~deed~~) ; see also *Florida Board of Forestry v. Lindsay*, 205 So.2d 358, 361 (Fla. 2d DCA 1967), and *City of Tarpon Springs v. Koch*, 142 So.2d 763 (Fla. 2d DCA 1962), cert. discharged, 155 So.2d 151 (Fla. 1963). Again, in addressing this issue, the Trustees urge that the lands were sovereignty in character, but they did not obtain title to them until the legislature enacted chapter 69-308 Laws of Florida. See § 253.12, Fla. Stat. (1971) (vesting title to submerged lands under navigable waters in the Trustees). Thus, they argue that they were without authority to ever convey title until more than eighty years after issuance of the deeds relied on by plaintiffs. Even assuming, arguendo, that the lands were sovereignty as opposed to swamp and overflowed lands, titles acquired by defendants to these lands after their conveyance to the plaintiffs inured to the benefit of the plaintiffs as grantees. *Daniell v. Sherrill*, 48 So.2d

736, 740 (Fla. 1950); *Spencer v. Wiegert*, 117 So.2d 221 (Fla. 2d DCA 1959), cert. denied, 122 So.2d 406 (Fla. 1960).

Accordingly, we hold that the doctrine of legal estoppel bars any claim of ownership by the Trustees, since they did not reserve any rights in the deeds to the plaintiffs' predecessors. It follows that Coastal Petroleum is also estopped from claiming any right or title against plaintiffs under its lease from defendants. *McAdoo v. Moses*, 101 Fla. 936, 132 So. 638, 640 (1931); *Key West Wharf and Coal Co. v. Porter*, 63 Fla. 448, 58 So. 599, 610 (1912).

3. Applicability of the Marketable Record Title Act.

The final issue we address is whether the Marketable Record Title Act (MRTA), chapter 712, Florida Statutes, applies to the 1883 swamp and overflowed deeds. The legislature adopted MRTA in 1963. Section 712.02, Florida Statutes (1963) provides that any person whose chain of title extends from any title transaction recorded over thirty years has a marketable record title free and clear of all claims except those in 712.03. MRTA, however, does not affect the state's right, title or interest reserved in a patent or deed by which the state parted with title if the reservation is explicit. § 712.04, Fla. Stat. (1981); *Sawyer v. Modrall*, 286 So.2d 610 (Fla. 4th DCA 1973), cert. denied, 297 So.2d 562 (Fla. 1974). See also *Odom*, 341 So.2d at 989. Accord *Starnes v. Marcon Investment Group*, 571 F.2d 1369 (5th Cir. 1978).

After the supreme court decided *Odom*, the 1978 legislature amended section 712.03, Florida Statutes, to exempt state title to lands beneath navigable waters acquired by virtue of sovereignty. See § 712.03(7), effective June 15, 1978. The Trustees assert that the lands were sovereignty lands and thus exempted from MRTA's application by the 1978 amendment. As previously noted,

we agree with the trial court's determination that these lands were not sovereign in nature.

Even assuming, arguendo, the lands were sovereignty lands, we cannot agree with the Trustees. Rather, we align ourselves with the view recently expressed by the Fifth District Court of Appeal. There our sister court held that section 712.03(7) does not apply retroactively even where the Trustees themselves wrongfully issued a deed at the "root of title" prior to the initial passage of MRTA in 1963. *Board of Trustees of the Internal Improvement Trust Fund v. Paradise Fruit Co.*, 414 So.2d 10 (Fla. 5th DCA 1982), *petition for review denied*, 432 So.2d 37 (Fla. 1983). Here, as in *Paradise Fruit Co.*, the Trustees executed the deeds, which are the plaintiffs' "root of title." § 712.01(2), Fla. Stat. (1981). Plaintiffs' titles under the 1883 deeds were perfected under MRTA, as enacted in 1963; therefore, retroactive construction of the amendment would unconstitutionally deprive them of rights vested in 1963. *Paradise Fruit Co.*, 414 So.2d at 11. See also *State Department of Natural Resources v. Contemporary Land Sales, Inc.*, 400 So.2d 488 (Fla. 5th DCA 1981). Consequently, MRTA vested title to these lands in the plaintiffs even if they were sovereignty lands.

Accordingly, we affirm the summary final judgments in each of the cases. However, because we recognize the significant impact of our decision on the riverbeds of the Peace River, we certify the following questions to the Supreme Court of Florida as questions of great public importance:

1. DO THE 1883 SWAMP AND OVERFLOWED LANDS DEEDS ISSUED BY THE TRUSTEES INCLUDE SOVEREIGNTY LANDS BELOW THE ORDINARY HIGH-WATER MARK OF NAVIGABLE RIVERS?
2. DOES THE DOCTRINE OF LEGAL ESTOPPEL OR ESTOPPEL BY DEED APPLY TO

1883 SWAMP AND OVERFLOWED DEEDS
BARRING THE TRUSTEES' ASSERTION OF
TITLE TO SOVEREIGNTY LANDS?

3. DOES THE MARKETABLE RECORD TITLE ACT, CHAPTER 712, FLORIDA STATUTES, OPERATE TO DIVEST THE TRUSTEES OF TITLE TO SOVEREIGNTY LANDS BELOW THE ORDINARY HIGH-WATER MARK OF NAVIGABLE RIVERS?

HOBSON, A.C.J., and SCHEB and LEHAN, JJ.,
concur.

APPENDIX F

**TENTH JUDICIAL CIRCUIT
POLK COUNTY**

Case No. GC-G-82-1089.

MOBIL OIL CORPORATION

v.

COASTAL PETROLEUM COMPANY, *et al.*

July 30, 1982

OLIVER L. GREEN, JR., Circuit Judge.

Plaintiff, Mobil Oil Corporation, a New York corporation, together with its predecessor, Virginia-Carolina Chemical Company, will be referred to as Mobil. Defendants, 1) Coastal Petroleum Company, a Florida corporation, will be referred to as Coastal, and 2) The State of Florida, the Department of Natural Resources of the State of Florida, and the Board of Trustees of the Internal Improvement Trust Fund of the State of Florida, will be referred to as the State.

This is a suit by Mobil under Chapter 65, Florida Statutes, to quiet its title to the lands described in Attachment A hereto with respect to claims made by Defendants. Mobil's recorded title in Polk County to the

lands is undisputed except as this title may be affected by sovereignty considerations and Lease 224-B. The lands were conveyed to Mobil's predecessors through various deeds issued by the State, through the Trustees of the Internal Improvement Fund and the Board of Education, in the late 1800's and early 1900's without recorded reservation of ownership interest or public rights. The State asserts an ownership interest to a portion of the lands by contending that the State's conveyances were void because the lands underlie navigable waterbodies, to-wit, the Peace and Alafia Rivers, and are therefore state-owned sovereignty lands which, at the time of the State's deeds to Mobil's predecessors, were not subject to conveyance into private ownership. The State further contends that Mobil and its predecessors are charged with visual notice of the characteristics of these waterbodies. The State first asserted their claim of ownership in 1977. It is undisputed that the official surveys of the lands in question, which were performed by United States government surveyors, did not list navigable waterbodies on the lands and did not meander any of the streams located thereon.

Coastal asserts an interest to the minerals in the lands claimed by the State, and in additional lands described in Attachment A hereto underlying streams and creeks that flow into the Peace and Alafia Rivers, by virtue of an oil and gas exploration lease (Lease 224-B) that it received from the Trustees of the Internal Improvement Fund in 1946. This lease purported to convey certain mineral rights to state-owned lands. Mobil's chain of title, as reflected by the public records of Polk County, predates Lease 224-B.

Mobil filed its motion for summary judgment, with supporting materials, on May 17, 1982. A hearing on the motion, at which all parties were represented, was held on June 19, 1982. By order dated June 14, 1982, the parties were notified that the matter would be con-

tinued for decision until after resolution of the then pending interlocutory appeals and upon consideration of all other pleadings then on file. The appeals have now been dismissed, and the Court has considered all materials or pleadings on file in this case. The Court concludes that there is no genuine issue of material fact, and that Mobil is entitled to prevail over Defendants as a matter of law. Consequently, Mobil's motion for summary judgment quieting its title to the lands described in Attachment A hereto against any and all claims of Coastal and the State should be and is hereby granted.

My findings are as follows:

- (1) This Court has jurisdiction.
- (2) Fee simple title to the lands described in Attachment A hereto is now, or was, or has been in Mobil during the period of its record title to the lands, without any recorded reserved interests in the State, and free of any legal claim of Coastal under Lease 224-B.
 - (a) United States Government surveys of the lands between 1850 and 1855 recited no navigable waterbodies on the lands and did not meander any of the streams.
 - (b) *Martin v. Busch*, 112 So. 274 (Fla. 1927), established the concept that a grantee of *unsurveyed* land bordering on an obviously navigable waterbody takes with notice that a conveyance of this land does not include the sovereignty land underlying the waterbody. This concept does not apply in the present case, where the land was surveyed *before* it was acquired by the State and conveyed by the State to the original grantee. *Pierce v. Warren*, 47 So.2d 857, 860 (Fla. 1950); *Odom v. Deltona Corp.*, 341 So.2d 977, 988-89 (Fla. 1976).
 - (c) The lands in question were originally conveyed many years ago by the federal government to the State without documented sovereignty limitations and were subsequently deeded to Mobil's predecessors in title either as swamp and overflow lands or internal improvement

lands by the State through the Trustees of the Internal Improvement Fund, or as school lands by the State through its Board of Education. As the State did not claim an interest in the lands before the 1970's, it cannot now claim ownership by questioning its own recitals, in its original deeds conveying the lands, that the lands were capable of being conveyed without reservation. *Odom v. Deltona Corp., supra; Trustees of Internal Improvement Fund v. Lobeau*, 127 So.2d 98 (Fla. 1961); and *Daniell v. Sherrill*, 48 So.2d (Fla. 1950).

(d) In *Odom v. Deltona Corp., supra*, the Supreme Court recognized that Florida land titles would be thrown into turmoil if state officials were permitted to question the validity of surveys and deeds that are over 100 years old:

Stability of titles expressly requires that, when lawfully executed land conveyances are made by public officials to private citizens without reservation of public rights in and to the waters located thereon, a change of personnel among elected state officials should not authorize the government to take from the grantee the rights which have been conveyed previously without appropriate justification and compensation. If the state has conveyed property rights which it now needs, these can be reacquired through eminent domain; otherwise, *legal estoppel is applicable and bars the Trustees' claim of ownership, subject to rights specifically reserved in such conveyances.*

341 So.2d at 989 (emphasis supplied).

(e) In *Odom v. Deltona Corp., supra*, the Supreme Court refused to allow the Trustees of the Internal Improvement Fund to dispute the declaration in their deed that the land was swamp and overflowed land which was capable of being conveyed. The trial court, in language later approved by the supreme Court, had stated:

This Court is in a poor posture to evaluate the work of those surveyors of many decades past. It can only be accepted that they did their job as instructed and recorded what they found then, which may or may not be what appears now. Fresh water lakes and ponds do change rather significantly because of both natural and artificial alterations in the areas involved. It is to be observed that governmental conveyances were made in reliance on them and the grantees of such conveyances had the right to assume the U.S. Government and the Trustees were acting lawfully.

341 So.2d at 984.

(f) In applying the doctrine of estoppel against the State in a virtually identical title dispute over submerged lands, Judge Stephenson of this Court held last year:

[T]he Trustees are legally estopped to rebut the presumption of non-navigability after the government survey has stood unimpeached for so many years. The Trustees expressly stated in the initial deed that the land was swamp and overflow land, which by definition means it is not sovereignty land. . . . The Trustees are estopped from presenting the issue of sovereignty ownership for determination now by this Court.

American Cyanamid Company v. State Board of Trustees of the Internal Improvement Trust Fund, No. GCG-80-290, Final Judgment at p. 13 (Fla. 10th Cir.Ct. July 27, 1981).

(g) The state's selection and classification of the land as swamp and overflowed land constituted a proper exercise of power conferred by state statutes. Chapter 332, Laws of Florida (1850); Chapter 610, Law of Florida (1854-55). The physical character and legal classification

of the lands necessarily were also confirmed by federal authorities pursuant to the Swamp Lands Act of 1850, 9 U.S. Stat. 519, 43 U.S.C. § 981 *et. seq.* *McCormick v. Hayes*, 159 U.S. 332 (1895); *French v. Fyan*, 93 U.S. 169 (1876). These actions of duly constituted authority cannot here be questioned under Florida law. Section 197.228(2), Florida Statutes, provides that navigable waters in Florida "shall not be held to extend to any permanent or transient waters in the form of so-called lakes, ponds, *swamps or overflowed lands*, lying over and upon areas which have heretofore been conveyed to private individuals by the United States or by the state *without reservation of public rights in and to said waters.*" (Emphasis supplied.) In construing Section 197.228(2) to accord finality to swamp and overflow determinations made by prior officials, the Supreme Court has approved the following statement:

There is a recognition in Section 197.228(2) that an unconditional conveyance by the state or national government of a described area to private ownership without a specific reservation is in itself a contemporaneous finding that such area is not sovereignty property and that such finding should not be questioned. The actions of duly constituted authority are recognized as entitled to be regarded as based on a proper exercise of powers conferred and not a usurpation or other illegal conduct.

Odom v. Deltona Corp., *supra*, at 984 (emphasis supplied). The same reasoning applies to and validates the state's classification and conveyance of those lands included in Attachment A hereto that were described as internal improvement lands or as school lands in the original conveyances by the State to Mobil's predecessors.

(h) Coastal, as a party in privity with the State, is legally limited in challenging the validity of the conveyances by the State and its departments or agencies to

Mobil's predecessors in title to the same extent as the State is limited, because "[i]t is well settled, also, that a person claiming title under one who is estopped will also be bound by the estoppel." *Key West Wharf & Coal Co. v. Porter*, 63 Fla. 448, 58 So. 599, 610 (1912); see also, e.g., *McAdoo v. Moses*, 101 Fla. 936, 132 So. 638, 640 (1931); *Coral Realty Co. v. Peacock Holding Co.*, 103 Fla. 1916, 138 So. 662, 625 (1931).

(3) The deeds to Mobil's predecessors were effective to convey title to the lands, including all proprietary rights in the soil. The Court does not at this time determine whether any waterbodies on the lands are, or ever were, navigable in fact, because it is unnecessary to do so to decide this case. Even assuming that the lands at the time of the State's original conveyances were sovereignty in character and subject to a governmental trust for the preservation of public easements in the waters thereon, a conveyance of the State's proprietary interests in sovereignty property has long been recognized as proper under Florida law, subject only to the State's implied retention of necessary regulatory powers over such property. See *State v. Black River Phosphate Company*, 13 So. 640 (Fla. 1893); *Pembroke v. Peninsular Terminal Co.*, 146 So. 249, 263 (Fla. 1933); and *State ex rel. Buford v. City of Tampa*, 102 So. 366, 340-41 (Fla. 1924). So long as the right of public use of the navigable waterbody is preserved, the public trust is satisfied, irrespective of the title to the underlying bottom. *Holland v. Ft. Pierce Financing & Construction Co.*, 27 So.2d 76, 81 Fla. 1946). Since Mobil does not seek to quiet title against public use or other governmental rights, there is no need to decide how the deeds and other past conduct of state officials affected any such rights. Also, although not essential for determination in this action, this Court recognizes that once the State has parted with its proprietary interest in lands under navigable or non-navigable waters, it nevertheless retains authority to regulate activities in the waters or on adjoining wetlands to pro-

tect the public health, safety and welfare. See *Gies v. Fischer*, 146 So.2d 361, 363 (Fla. 1962) and *Graham v. Estuary Properties, Inc.*, 399 So.2d 1374 (Fla. 1981).

(4) Mobil's record title to each parcel of the lands in question is based on a continuous chain of recorded title transactions proceeding from a valid "root of title" which was recorded in Polk County for more than 30 years before the effective date of the Florida Marketable Record Title Act (the "MRTA"), Chapter 712, Florida Statutes. Although it is not essential to the judgment in this case, Mobil clearly also buttresses its marketable record title to the lands by virtue of the provisions of the MRTA. Even assuming that the land in question is sovereignty land (which, I repeat need not be and is not decided as an issue of fact in this case), the MRTA has consistently been construed to vest fee simple title as against a sovereignty ownership claim by the State or the Trustees. *Odom v. Deltona Corp.*, *supra*; *Board of Trustees of the Internal Improvement Trust Fund of the State of Florida v. Paradise Fruit Company, Inc.*, 7 F.L.W. 932 (Fla. 5th DCA April 28, 1982); *State Department of Natural Resources v. Contemporary Land Sales, Inc.*, 400 So.2d 488 (Fla. 5th DCA 1981); *State Board of Trustees of the Internal Improvement Trust Fund v. Laney*, 399 So.2d 408 (Fla. 3d DCA 1981); and *American Cyanamid Company v. State Board of Trustees of the Internal Improvement Trust Fund*, *supra*.

The attempted recording of Coastal's lease in Polk County in 1954 was insufficient to act as an exception to the marketability of Mobil's title to the lands. The attempted recording of an unexecuted printed, and conformed copy as an attachment to a royalty deed from Coastal to a third party does not constitute the recording of an adverse title transaction, as contemplated by the MRTA. The descriptions of the lands in the lease as "the bottoms of and water bottoms adjacent to" certain named

rivers "together with all connecting sloughs, arms and overflow lands located in such waters" is too vague and uncertain to enable the land to be identified and, therefore, the lease cannot qualify as an exception to marketability. *Board of Trustees of the Internal Improvement Trust Fund of the State of Florida v. Paradise Fruit Company, Inc.*, *supra*; *American Cyanamid Co. v. State Board of Trustees of the Internal Improvement Trust Fund*, *supra*.

(5) Inasmuch as the State made no reservation of public ownership rights in the prior conveyances of these lands to Mobil and to its predecessors (of which Coastal had notice by virtue of the recording acts), any claim by Defendants based upon Lease 224-B is without foundation in law or in fact.

(6) Because it is unnecessary to my decision, I make no finding at this time (indeed, the facts may be controverted) on Mobil's claim that it has perfected title to the lands under the statutory doctrine of adverse possession.

It is, thereupon, ORDERED AND ADJUDGED that:

(a) Under principles of legal estoppel, as recognized, ratified and confirmed in the Florida Statutes, the conveyances by the State of the lands described in Attachment A hereto were valid and effective as against the Defendants to transfer title to the subject lands to Mobil's predecessors, and Mobil (or its grantees) for that reason is the owner in fee simple of all lands described in Attachment A hereto, said lands being located in Polk County, Florida.

(b) The fee simple title in and to the lands described in Attachment A hereto is hereby quieted in Mobil or in those claiming by, through or under it, as against Defendants. Mobil has been the owner of these lands from the date of their acquisition by Mobil by recorded deed, until the lands, or some of them, were conveyed to third parties, free and clear of any right, title, interest or

claim of any kind whatsoever by Defendants. Chapter 65, Florida Statutes (1981).

(c) The fee simple title in and to the lands described in Attachment A hereto also includes the entire ownership by Mobil of all proprietary rights in both the surface and subsurface of the lands.

(d) Mobil's fee simple title to the lands described in Attachment A hereto was acquired prior to and is superior in all respects to any rights granted to Coastal under Lease 224-B

(e) This final judgment does not extinguish any rights of the public to use the waters of the Peace or Alafia Rivers for boating, fishing, swimming, or other public purposes, nor does it establish any right in Mobil, or those claiming by, through, or under it, to prevent or interfere with any such public use. It is not necessary in this case to now decide how the deeds and other past conduct of the State affected public use or other governmental rights in the Peace and Alafia Rivers because Mobil has excluded any such rights from the clouds it has sued to remove, and because the State has not alleged that Mobil has invaded such rights and has not sought affirmative relief from this Court (whose jurisdiction it denies) to declare or enforce such rights.

(f) This Court does not by this final judgment intend to interfere in any way with the lawful rights of the State, or any agency thereof, to exercise its environmental and other governmental powers over any waterbodies flowing through said lands, or to regulate those waterbodies for drainage, irrigation, pollution control, navigation, fishing, or other public purposes. This final judgment is also not intended to affect the rights of other riparian owners who are not parties to this action or of the public to the continued use of presently existing public rights of way on the lands.

APPENDIX G

IN THE SUPREME COURT OF FLORIDA

Case No. 65,913

THE BOARD OF TRUSTEES OF THE
INTERNAL IMPROVEMENT TRUST FUND,
Petitioner,
vs.

MOBIL OIL CORPORATION,
Respondent.

MOBIL OIL CORPORATION'S
MOTION FOR REHEARING

MOTION FOR REHEARING

Substantive rules governing the law of real property are peculiarly subject to the principles of stare decisis.

Adkins, J., in *Askew v. Sonson*, 409 So.2d 7, 15 (Fla. 1981).

Regrettably, the Court's decision in the *Coastal Petroleum* cases tells all who read it that the doctrine of stare decisis is optional in Florida today. In a strangely casual opinion,¹ the Court's majority *sub silentio* overrules three of its prior decisions.² It admits overruling none. To identify those precedents anonymously cast aside, one need only proceed to the dissenting opinion of Chief Justice Boyd.

This disposition is particularly troublesome in view of the Court's recent declarations, in ringing lines, that private property interests enjoy *some* measure of state-ordered³ protection against governmental whim.⁴

¹ For example, the majority opinion devotes only five sentences to the second certified question and ignores the Court's own precedent in *Trustees of the Internal Improvement Fund v. Lobeau*, 127 So.2d 98 (Fla. 1961), which is silently overruled.

² *Lobeau*, *supra*; *Odom v. Deltona Corp.*, 341 So.2d 977 (Fla. 1977); *Pembroke v. Peninsular Terminal Co.*, 108 Fla. 46, 146 So. 249 (1933) (title to land should rest upon a grant, not upon an evidentiary fact).

³ Fifth Amendment federal protection under the "taking" clause, applicable to state action through the Fourteenth Amendment, is also involved in these cases.

⁴ "Stability of titles expressly requires that, when lawfully executed land conveyances are made by public officials to private citizens without reservation of public rights in and to the waters located thereon, a change of personnel among elected state officials should not authorize the government to take from the grantee the rights which have been conveyed previously without appropriate justification and compensation. If the state has conveyed property

In order to arrive at the result reached in these cases, the majority has inadvertently created unexplained conflicts with the Court's own prior precedents. The majority has also obviously overlooked historical facts and circumstances that contradict its conclusions.

Even if the majority is not troubled by the chaos its decision will create in Florida real property law, it should be concerned about the retroactive effect of its decision. The Court has created the "inequitable" result feared by the majority report of the 1985-86 Marketable Record Title Act Study Commission.⁵ Unless the Court at least modifies its decision to make it prospective only, it will expose landowners throughout Florida to damage claims based on the past use of land long believed by everyone, including the Trustees, to be in private ownership. By making its decision prospective only, the Court would protect the Trustees' ownership claims without penalizing landowners who relied upon the state's classification of the lands as non-sovereignty for over a hundred years.

Mobil moves for rehearing and urges the grounds that follow.

I.

The majority has misperceived this Court's prior opinion in *Odom v. Deltona Corp.*, *supra*. The majority says that *Odom* involved a "factual determination that the small lakes and ponds at issue were non-navigable, non-sovereignty lands." Both sides in the present controversy have agreed that statement is simply not correct.

The Trustees asserted a "clear" position in their brief on the merits:

rights which it now needs, these can be reacquired through eminent domain. . . ."

Boyd, J., in *Odom v. Deltona Corp.*, 341 So.2d 977, 989 (Fla. 1977).

⁵ See discussion at page 12, *infra*.

It is also clear that the Circuit Court in *Odom* made no factual determination of the navigability of the lakes in issue.

(Trustees' brief at 26). Thus, the majority's failure to follow *Odom* is based upon a distinction that has been unanimously repudiated by the parties to this controversy.

The *Odom* record-on-appeal contained the following sworn answer to an interrogatory on the point at issue:

Angela Lake as designated by the plaintiff, and all other waterbodies within the Butler Chain of Lakes are navigable waters of the State of Florida and held by the Board of Trustees in its sovereign capacity.

(Answer of John W. Dubose). The *Odom* trial court did not reach the issue of navigability *in fact* because it determined, on motion for summary judgment, that the waters were non-navigable *as a matter of law*. In concluding to the contrary, the majority here has disregarded the Court's own record in the *Odom* case.⁶

There is still another deficiency in the majority's analysis of the *Odom* rationale. After quoting the statement in *Odom* that

it seems absurd to apply this test [notice of navigability] to small, non-meandered lakes and ponds of

⁶ In addition to Dubose's sworn answer quoted above, which is in the original record now lodged in the trial court, the following matters appear in this Court's file: "[T]he Butler Chain of Lakes is a navigable chain of lakes, the title to which is now vested in the Board of Trustees in its sovereign capacity." Sworn answers of John W. Dubose to interrogatories numbered 25 and 27, pp. 65-66, appendix to brief of appellee The Deltona Corporation. "In adopting the judgment of the lower court, this Court recognized that the question of navigability is a question of fact. . ." Paragraph 19, Petition for Rehearing of Attorney General. "[N]avigability is still an unresolved factual issue." Paragraph C.1., Trustees' Petition for Rehearing.

less than 140 acres and, in many cases, less than 50 acres in surface. . .

the majority states that “[t]he ground on which *Odom* rests is *this factual determination* that the small lakes and ponds at issue were non-navigable, non-sovereignty lands” (emphasis added). There are at least three things wrong with that statement. First, the language quoted from *Odom* clearly is not a factual determination; it is a conclusion of law. Second, it just as clearly is not a determination that the waterbodies were “non-navigable, non-sovereignty lands;” rather it is a determination that “notice of navigability” should not be applied to small lakes and ponds. And, finally, even if it were a factual determination, the Florida Supreme Court is hardly the forum for determining facts, particularly on appeal from a summary judgment as in *Odom*.

Because of the majority’s misperception of the holding in *Odom*, rehearing is essential in these cases.

II.

Perhaps the strangest aspect of the majority opinion is its failure to advise the district court of appeal, in response to its second certified question, of the basis for rejecting this Court’s own precedent upon which the district court understandably relied.

The second certified question involves the doctrine of legal estoppel or estoppel by deed. The district court of appeal gave an affirmative answer to the second certified question, holding:

[T]he court properly concluded that defendants are estopped from asserting any right or title in derogation of the 1883 deeds conveying swamp and overflowed lands. *Board of Trustees of the Internal Improvement Fund v. Lobeau*, 127 So.2d 98 (Fla. 1961) . . .

454 So.2d at 8. In answering the second question, the majority does not even mention *Lobean*, let alone advise the district court or the parties why it is not controlling.

Lobean involved submerged, sovereignty lands in Gasparilla Sound. The lands were mistakenly conveyed to Lobean in a Murphy Act deed.⁷ Manifestly, the Trustees could not have intended to convey sovereignty lands by Murphy Act deed, yet this Court held that they were estopped to question Lobean's title or the recitals in their deeds. Applied here, that holding means that the Trustees are likewise estopped to question the recitals in their 1883 deeds that the lands conveyed were swamp and overflowed lands, not sovereignty lands.

Unless the majority intends to overrule *Lobean*, rehearing is required to apply its holding to the facts of these cases. If the majority does intend to overrule *Lobean*, it should clearly articulate the policy reasons for doing so, bearing in mind the peculiar application of stare decisis principles to substantive real property rules. *Askew v. Sonson, supra*. Nor does *Lobean* stand alone as recent (rather than ancient) precedent for application of the doctrine of legal estoppel to the facts of these cases. Six members of the *Odom* court concurred in the application of the doctrine of legal estoppel to preclude the Trustees from asserting sovereignty title to lands which had been deeded by their predecessors as non-sovereignty lands.⁸

The result in *Lobean* is fully compatible with and supported by the doctrine of after-acquired title. A lesser

⁷ Because sovereignty lands are not subject to taxation, title to such lands could never vest in the Trustees under the provisions of the Murphy Act.

⁸ The dissenting opinion of Justice Sundberg in *Odom*, concurred in by Justice Overton, expressly adopted the legal estoppel holding as correct. Consequently, two justices who approved the application of legal estoppel in *Odom* have shifted positions in the present case.

property interest than fee simple can constitute property within the rule of estoppel as to after-acquired property. *Spencer v. Wiegert*, 117 So.2d 221, 226 (Fla. 2d DCA 1959), *cert. denied*, 122 So.2d 406 (Fla. 1960). The Trustees acquired statutory authority to *sell or lease* mineral interests in 1923⁹ and again in 1929.¹⁰ Consequently, when the Trustees acquired title to or authority over those mineral interests by act of the legislature, their after-acquired authority was sufficient to perfect title to the minerals in the grantees under their 1883 deeds. Thus, Mobil's predecessors had long before acquired title to the minerals involved in this case when the Trustees purported to lease them to Coastal in 1946.¹¹

III.

The centerpiece of the majority's answer to the third certified question, dealing with MRTA, is its assessment of legislative history leading to the 1963 Act. This assessment erroneously assumes a predicate that is non-existent and proceeds to reach a conclusion that is contradicted by historical facts.

In discussing the original enactment of MRTA in 1963, the majority simply stated its crucial premise:

We see nothing in the act itself or the legislative history presented to us suggesting that the legislature intended to casually dispose of irreplaceable public assets.

That premise is errant for the obvious reason that the parties neither briefed nor argued legislative history

⁹ Ch. 9289, Laws of Florida (1923).

¹⁰ Ch. 13670, Laws of Florida (1929).

¹¹ Because Coastal did not appeal the final judgment below, it was not a party in the district court of appeal and is not a party here. For that reason, this motion addresses only the Trustees' claim against Mobil, which is the only claim passed upon by the majority opinion.

antecedent to passage of the Act of 1963.¹² The reason they did not is equally obvious; since *Sawyer v. Modrall*, 286 So.2d 610 (Fla. 4th DCA), *cert. denied*, 297 So.2d 562 (1974), the Act has consistently been construed for a dozen years as saying what it plainly means and meaning what it plainly says: that *all* interests, both private and *governmental*, including those of the state and its agencies, are extinguished by operation of the Act. No legislative history is necessary to ascertain the meaning of that unambiguous language.

But the majority's conclusion, quoted above, is flawed for another reason, one that is rooted in the historical facts underlying this dispute. To understand what the legislative intent *might* have been, if the Act were ambiguous in any way, one need only recall the state's policy of managing sovereignty lands at the time the Act was adopted.

For approximately a decade, beginning during the late 1950s and continuing until adoption of the 1968 Constitution, the Trustees regularly held Tuesday auctions at which sovereignty lands were sold to the high bidder. Appended to this motion (App. 5-57) are excerpts from the minutes of Trustee meetings from April 2, 1963, to June 4, 1963—the period during which the 1963 legislature was in session.¹³ These public records reveal that

¹² The only legislative history brought to the Court's attention was that supporting adoption of the 1978 MRTA amendment.

¹³ Respondent asks the Court to judicially notice these public records obtained from the Trustees' archives. On past occasions the Court has judicially noticed public documents in connection with a rehearing request when appropriate to correct oversights in the Court's initial opinion. For example, in *Hayek v. Lee County*, 231 So.2d 214 (Fla. 1970), Case No. 38,949, the Court granted rehearing and reversed its position, based in part upon submissions made by the Attorney General: "[W]e urge now that the Court knows what everybody knows. . . ." Petition for Rehearing filed November 19, 1969, by the Attorney General asking the Court to take judicial notice of certain public records and attaching documentary evidence in support of the petition.

the Trustees sold twenty-three parcels of sovereign lands —the “irreplaceable public assets” described by the majority—while the 1963 session of the legislature was sitting.¹⁴ Against this background of undisputable historical fact, to argue that the legislature could not have intended to permit the disposal of sovereignty lands by operation of law is simply incredible. The 1968 Constitution changed the practices described above. But the dispositive facts now before the Court were all in place long before 1968.

The majority’s failure to apply a 1963 perspective to its search for 1963 legislative intent is another error requiring reconsideration of the present opinion.

IV.

In ruling that the legislature of Florida did not intend to divest the state of title to the lands here at issue, the majority either overlooked or failed to consider the effect of nineteenth century legislation directly affecting lands in the Peace River area.¹⁵

In 1860 the legislature addressed the navigability of “Peas Creek,” the name given the upper reaches of the Peace River by the government surveyors. It passed a law authorizing the Trustees to contract “for the cleaning out of the channel of Peas creek, *in order to render said stream navigable* and for the purpose of draining the swamp and overflowed land *thereon*” (emphasis added). When that purpose was not achieved, the legislature passed another act in 1881 reciting that a certain

¹⁴ The waterbodies beneath which these sovereign lands lay were the following: Biscayne Bay, Florida Straits, Jupiter Sound, Halifax River, Indian River, Sacarma Bay, Banana River and Stranahan River.

¹⁵ Chapter 1199, Laws of Florida (1860); chapter 3322, Laws of Florida (1881). These statutes are appended to this motion (App. 2-4). They were brought to the Court’s attention by Notice of Supplemental Authority served prior to oral argument and by counsel’s presentation at oral argument.

contractor had failed to deepen the channel of the creek and authorizing the Trustees to sell the lands coursed by the creek. Read together, those two legislative enactments effectively classified Peas Creek as non-navigable in its ordinary state¹⁶ and expressly authorized the Trustees to sell the lands presently owned by Mobil.

The majority deals only with section 197.228(2) (now section 253.141(2)), Florida Statutes, in examining legislative intent to dispose of these lands. Its failure to consider legislative intent as reflected by a statute adopted just two years before the deeds in question were executed is a serious oversight requiring reconsideration on rehearing.

V.

If rehearing is not granted on other grounds, the majority should at a minimum modify its opinion and decision to make them prospective in effect. Such a holding would protect the Trustees' sovereignty claim under the public trust doctrine without penalizing landowners who relied upon the state's classification of the lands as non-sovereignty for more than a century.¹⁷

Regardless of the majority's present characterization of its *Odom* holding, it is beyond dispute that the decision was universally understood as holding that the Trustees' claims "to beds underlying navigable waters previously conveyed are extinguished by the Act." It was

¹⁶ Determination of navigability is based upon the waterbody's ordinary and natural condition, Broward v. Mabry, 58 Fla. 398, 50 So. 826 (1909), without consideration of artificial improvements making it navigable, Clement v. Watson, 63 Fla. 109, 58 So. 25 (1912).

¹⁷ If the decision is applied prospectively, the prospective application could be either from the date the decision becomes final or, alternatively, from the date of any judicial determination that an original conveyance by the Trustees was invalid. The latter disposition is suggested in the motion for rehearing filed by Estech, Inc.

demonstrably so understood by the Trustees themselves,¹⁸ by the federal appellate court having jurisdiction over cases arising in Florida,¹⁹ and by all district courts of appeal confronting the issue between 1977 and 1986.²⁰ By denying review in *Board of Trustees of the Internal Improvement Trust Fund v. Paradise Fruit Company, Inc.*, 414 So.2d 10 (Fla. 5th DCA 1982), *pet. for rev. denied*, 432 So.2d 37 (Fla. 1983), presenting the precise MRTA issue now on review, the Court did nothing to call that universal interpretation into question.²¹

Prospective application of the Court's holding would comport with the conclusion reached by the Marketable Record Title Act Study Commission created by the 1985 session of the legislature. In its majority report, the Commission concluded as follows:

It also seems *inequitable*, in light of the confusion that has existed, that the State seek damages, fees, royalties or rent for its proprietary interests to which it might otherwise be entitled for the occupancy, use or *severance of resources* from submerged lands.

(Emphasis added). That inequity, of course, is what the present cases are all about.

¹⁸ "WHEREAS, certain recent court decisions hold that the Marketable Record Title Act, Chapter 712, Florida Statutes, could operate to extinguish state title to sovereignty lands, contrary to the public trust doctrine by which these lands are held. . . ." Excerpt from Resolution of the Trustees dated June 6, 1978, urging the legislature to exempt sovereignty lands from application of MRTA (Trustees' appendix at 79).

¹⁹ *Starnes v. Marcon Investment Group*, 571 F.2d 1369, 1371 (5th Cir. 1978) ("the State's claims of sovereignty were extinguished by operation of the Florida Marketable Record Title Act").

²⁰ See cases cited at p. 26, Answer Brief of Cyanamid-Estech.

²¹ Justices Adkins, Boyd, McDonald and Ehrlich voted to deny review in *Paradise Fruit*. Justice Overton dissented, finding conflict with *Odom and Martin v. Busch*.

The Court should grant rehearing and modify its opinion and decision to operate prospectively. Such a disposition would in the main accommodate the competing interests of the parties to this litigation.

VI.

The majority opinion construes Florida law in a manner that effectively takes Mobil's property in violation of the Fifth Amendment to the United States Constitution, as made applicable to the State of Florida by the Fourteenth Amendment. The majority decision allows the executive branch to reclassify lands a century after their conveyance into private ownership. It further constitutes judicial construction of a legislative act in derogation of its plain meaning so as to divest rights granted by the legislature.

As to the first point, the state classified the lands at issue as swamp and overflowed lands under legislatively directed procedures during the 1850s. Subsequently, the predecessor Trustees deeded the lands to Mobil's predecessors as swamp and overflowed lands, confirming the earlier classification. For more than 100 years after the initial classification of these lands as swamp and overflowed, the Trustees maintained that classification as official state policy.²² To permit reclassification by al-

²² In a 1965 brief filed on behalf of the Trustees to oppose Coastal's claim that its lease encompassed the headwaters of the Peace River, the Attorney General argued "that the Peace River was not meandered north of a line more than seventy (70) miles south of Lake Hancock," and therefore "the state did not own any of the Peace River bottom at that point." The First District Court of Appeal agreed with the Trustees' position and said in its decision: "Peace River north of Township 38/39 is not meandered and does not belong to the State. That is, Peace River for a distance of 40 miles south of Lake Hancock is in private ownership." Burns v. Coastal Petroleum Co., 194 So.2d 71, 74 (Fla. 1st DCA 1966), cert. denied, 201 So.2d 549 (Fla. 1967), cert. denied, 389 U.S. 913 (1967). All of the lands at issue here are within that upper portion

legations asserted in the present litigation a century after the conveyance into private ownership is a clear taking of private property by the state without just compensation and without due process of law in violation of the Fifth and Fourteenth Amendments to the United States Constitution.²³

The majority's construction of MRTA also constitutes a taking of vested property rights. As discussed above, point III, *supra*, the appellate courts of Florida, including this Court, consistently construed MRTA, for twelve years, as meaning what it obviously says: that governmental as well as private claims are extinguished by the provisions of the Act. The legislature could not constitutionally change that meaning by a retroactive amendment to the Act. It is equally repugnant to constitutional principles for this Court to achieve the same result by judicial interpretation.

For all of the reasons asserted in this motion, the Court should rehear and reconsider its decision filed May 15.

/s/ Julian Clarkson
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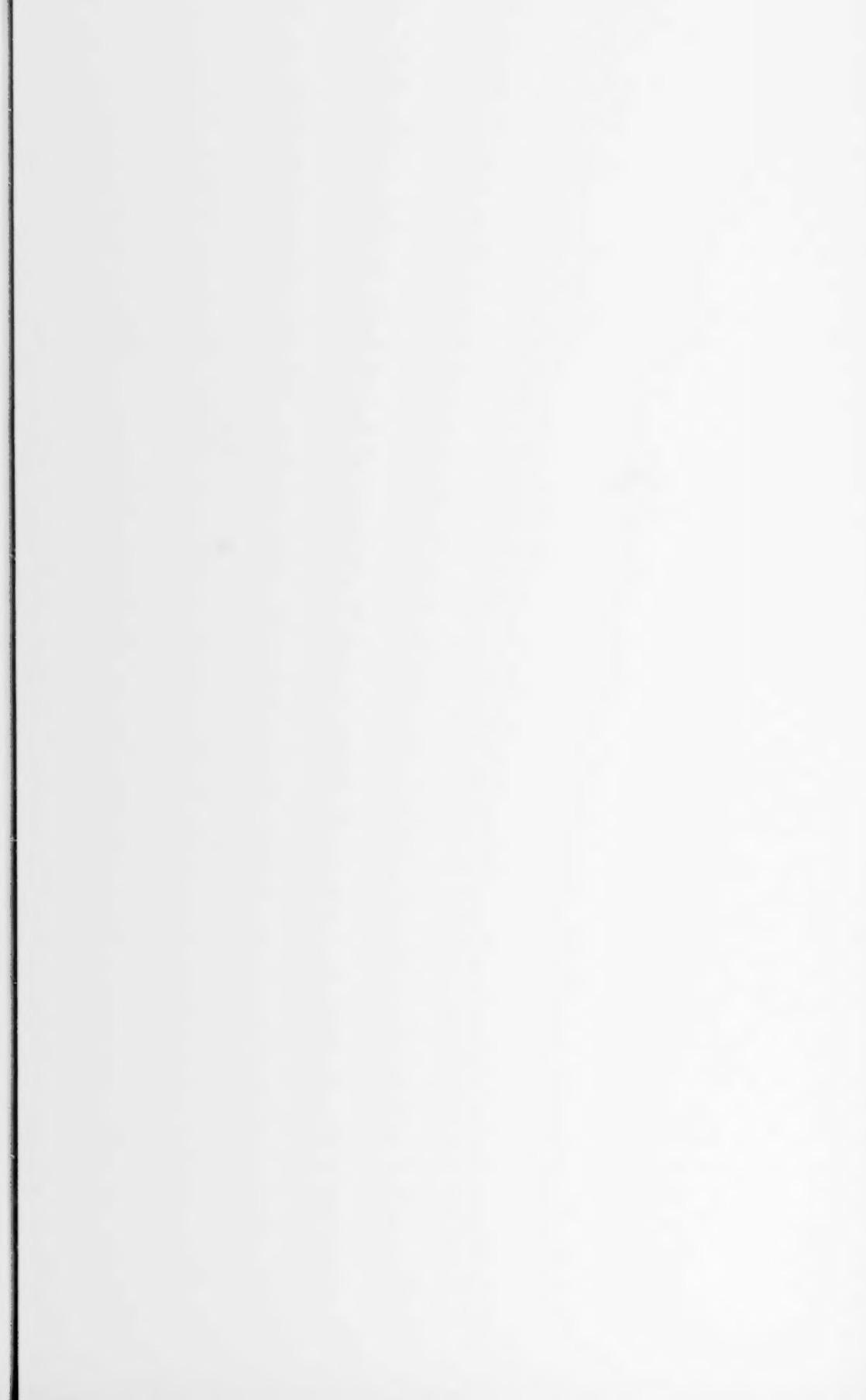
Attorneys for
Mobil Oil Corporation

May 30, 1986

of the Peace River which the state acknowledged and the court declared to be privately owned.

Other dates pertinent to a showing that the lands were considered and classified as nonsovereignty lands are shown on the chart displayed to the Court by counsel during oral argument (App. 1).

²³ See cases cited at page 22 of Mobil's Answer Brief. See also Robinson v. Ariyoshi, 753 F.2d 1468 (9th Cir. 1985), *pet. for cert. filed* (Sept. 1985).



NO. 86-823

6 1987

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

MOBIL OIL CORPORATION, Petitioner,

v.

BOARD OF TRUSTEES OF THE INTERNAL
IMPROVEMENT TRUST FUND OF THE
STATE OF FLORIDA, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

All courts below assumed, for purposes of ruling on summary judgment and on three certified questions arising therefrom, that the disputed lands in this quiet title action were and are sovereignty (equal footing) lands which passed to the State at statehood.

1. Whether determinations as to the character of land under the Swamp and Overflowed Lands Act of 1850, 43 U.S.C. § 982 et seq., are, as a matter of federal law, conclusive against the State and the State's Trustees with respect to its sovereignty lands in quiet title actions brought by a private claimant.

2. Whether a State judicial decision, which holds, as a matter of state law, that the State's Trustees' swamp and overflowed lands deeds to pri-

vate parties do not include the State's sovereignty lands below the high water mark of navigable rivers, contravenes the Due Process Clause of the Fourteenth Amendment as an unconstitutional taking.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the Supreme Court of Florida are listed in the caption. Pet. ii. Petitioner Mobil Oil Corporation is a subsidiary of Mobil Corporation. Id. Respondent Board of Trustees of the Internal Improvement Trust Fund of the State of Florida, consists of seven trustees (the Governor, Secretary of State, Attorney General, Comptroller, State Treasurer, Commissioner of Education, and Commissioner of Agriculture, and their successors in office). Fla. Stat. §253.02(1) (1985). The State of Florida and the Florida Department of Natural Resources, named defendants in the trial court, are real parties in interest. Pet. App. 42a. See Fla. Stat. §253.001, (1985). See generally App. D, infra, 66a n.1.

"Coastal Petroleum was a defendant in the Florida trial court but did not perfect an appeal of the final judgment in favor of Mobil Oil Corporation."

Pet. ii.

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NO. 86-823

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

MOBIL OIL CORPORATION, Petitioner,

v.

BOARD OF TRUSTEES OF THE INTERNAL
IMPROVEMENT TRUST FUND OF THE STATE
OF FLORIDA, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Florida Supreme Court (Pet.App. 1a-20a) is reported sub nom. Coastal Petroleum Co. v. American Cyanamid Co. at 492 So.2d 339. The opinion of the Florida District Court of Appeal, Second District (Pet.App. 25a-

33a), styled Board of Trustees of Internal Improvement Trust Fund v. Mobil Oil Corp., is reported at 455 So.2d 412 and adopts by reference (at Pet.App. 33a) that court's opinion in a connected case, Coastal Petroleum Co. v. American Cyanamid Co., (Pet.App. 34a-41a), which is reported at 454 So.2d 6. The opinion of the Florida Circuit Court for Polk County on summary judgment (Pet.App. 42a-51a), styled Mobil Oil Corp. v. Coastal Petroleum Co., is reported at 2 Fla.Supp.2d at 12.¹

JURISDICTION

The decision of the Florida Supreme Court, remanding this case for further proceedings in the lower Florida

¹ Vacated in its entirety as to State defendants in accordance with mandate, but remains in force as to Coastal Petroleum Co.; No. GC-G-82-1089 (Fla. 10th Cir. Ct. Sep. 30, 1986). The case is presently set for trial in March, 1987.

courts, was rendered on May 15, 1986, and a motion for rehearing (Pet.App. 52a-64a) was denied on August 27, 1986 (Pet.App. 22a). The judgment of the Florida Supreme Court was entered August 27, 1986 (Pet.App. 23a). The petition for a writ of certiorari was filed on November 20, 1986. 55 U.S.L.W. 3412. This Court's jurisdiction is purportedly invoked under 28 U.S.C. §1257(3). See Pet. 2, 15-25. For the reasons set forth below, none of the requirements necessary to invoke this Court's jurisdiction under 28 U.S.C. §1257(3) is satisfied here.

CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED

The petition sets forth certain provisions of the Swamp Lands Act of 1850, 43 U.S.C. §982 et seq. The petition omits the 1845 Act of Statehood for Iowa

and Florida, which provides in pertinent part:

That the States of Iowa and Florida be . . . declared to be States of the United States of America, and are hereby admitted to the Union on equal footing with the original states, in all respects whatsoever.

5 Stat. 742 (1845).

Section 197.228(2), Florida Statutes (1981), is reproduced at App. A, infra, 1a. This statute was quoted and relied on in the trial court and district court of appeal. See Pet. App. 6a, 37a, 47a. That section, originally adopted in 1953, Ch. 28262, §1, Laws of Florida (1953), is now renumbered Section 253.141(2), Florida Statutes (1985). See, e.g., Pet. App. 61a.

Section 1257(3) of 28 U.S. Code is reproduced at App. B, infra, 2a.

STATEMENT

The facts of this case ("Mobil IV") are generally set forth in the three decisions below. Pet. App. 1a-51a. For purposes of this Court's jurisdictional inquiry, the State accepts the summary of the facts in the decision below.² Particular attention is drawn

2 This case is one of a series of connected cases spanning ten years of litigation. "The present controversy was provoked by litigation in 1976 in a different Florida Circuit Court (for Leon County) between petitioner and a mineral lessee from the State, Coastal Petroleum Company." Pet. 9. As the District Court of Appeal below noted, "The title issues presented by Mobil's reply counterclaim in the Leon County Circuit Court case [filed in 1979] are the same as those involved in. . . [this] Polk County Circuit Court action. . . ." Pet. App. 27a. See also Mobil Oil Corp. v. Coastal Petroleum Co., 671 F.2d 419 (11th Cir.), cert. denied 459 U.S. 970 (1982). App. C, infra, 3a-61a ("Mobil I"). See generally Coastal Petroleum Co. v. International Minerals & Chemical Corp., TCA 77-0946, TCA 77-0971, TCA 77-0972, TCA 77-0973, TCA 77-0974, TCA 77-0975 (N.D. Fla. Jan. 10, 1979), rpt. in Trustees' Br., Mobil IV, App. 9 (App. D, infra, 34a-62a); Coastal Petroleum Co.

to the following.

1. Florida became part of the public lands of the United States as a result of the 1819 treaty with Spain and territorial status followed in 1822. In 1845 Florida was "admitted to the Union on equal footing with the original states, in all respects whatsoever." 5 Stat. 742 (1845).

2. The 1845 Act of Statehood reflects Congress' recognition of the constitutional equal-footing doctrine announced that same year by this Court in Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212 (1845), which case decided that states, on admission, "acquire title to the lands underlying navigable waters within their boundaries." Oregon ex rel. State Land Board v. Corvallis Sand and Gravel Co., 429 U.S. 363, 370 (1977)

v. U.S.S. Agri-Chemicals, 695 F.2d 1314 (11th Cir. 1983) (App. E, infra, 63a-84a).

("Corvallis"). Such lands under navigable waters are known in Florida as sovereignty or equal-footing lands and the State has title thereto defeasible only by itself. Corvallis, supra, at 373-74. State law governs how title to sovereignty land passes.³

3. Whether title to land originally belonging to the United States has passed to a State is a federal question to be decided by federal law, but once title so passes, state law governs.⁴

³ "After a State enters the Union, title to the land [under navigable waters] is governed by state law." Montana v. United States, 450 U.S. 544, 551 (1981), quoted and followed in, e.g., Wisconsin v. Baker, 698 F.2d 1323, 1327 (7th Cir. 1983) (7th Circuit's brackets).

⁴ We hold the true principle to be this, that whenever the question in any court, State or federal, is whether a title to land which had once been the property of the United States has passed, that question must be resolved by the laws of the United States; but that whenever according

4. Congress passed into law the Swamp and Overflowed Lands Act on September 28, 1850. 9 Stat. 519, codified as amended, 43 U.S.C. §§ 982-84 (the "Swamp Act").⁵ The State received from

to those laws, the title shall have passed, then that property, like all other property in the State, is subject to State legislation, so far as that legislation is consistent with the admission that the title passed and vested according to the laws of the United States.

Wilcox v. Jackson, 38 U.S. (13 Pet.) 498, 517 (1839) (emphasis added), quoted in Corvallis at 377.

5 Its purpose, as stated in the act, was to enable "the several states ... to construct the necessary levees and drains, to reclaim the swamp and overflowed lands therein...." 9 Stat. 519, §§ 1, 4, codified as amended, 43 U.S.C. § 982 (1984). All unsold swamp and overflowed lands belonging to the federal government as of September 28, 1850 were granted to the states as of that date. Id.

The act vested with the Secretary of the Interior the duty of making accurate lists and plats of the lands granted by the act. 9 Stat. 519, § 2, codified, 43 U.S.C. § 983. The Secretary

the United States about 20 million acres, or some two-thirds of the State, under the Swamp Act. Pet. App. 4a. This included all land abutting the navigable portion of the Peace River.

5. The Florida legislature responded to the passage of the Swamp Act by passing on January 23, 1851 "an act to secure the swamp and overflowed lands lately granted to the states...." Ch. 332, Laws of Fla. (1851). This act authorized the Governor to classify the lands under the Swamp Act and transmit the plats of these lands to the state register for sale. The legislature expanded on this law in 1855 by creating the Internal Improvement Fund, to which the State's internal improvement lands and

was then to transmit the lists and plats to the governors of the states involved, and, at the governors' request, to then cause patents to be issued to the states for the lands. Id.

swamp and overflowed lands were transferred that year. The Trustees of that Fund, now known as the Internal Improvement Trust Fund (the "Trustees"), were authorized to fix the price of and sell these lands.⁶

6. Additional grants of authority to the Trustees to dispose of state-owned lands were made from time to time by the Florida legislature. E.g., Pet. App. 6a (Acts of 1919); 1917 Fla. Laws Ch. 7304 (tidal sovereignty lands). The State did not specifically transfer title to its freshwater sovereignty lands to the Trustees until 1969. Fla. Laws Ch. 69-308, codified, as amended

⁶ 1854 Fla. Laws Ch. 610, (enacted January 1855) codified, Fla. Rev. Stat. §§428-429 (1892), amended, 1917 Fla. Laws Ch. 7304, codified as amended, Fla. Stat. § 253.01-.02 (1985). E.g. Pet. App. 35a.

Fla. Stat. § 253.12(1) (1985).⁷ At all times prior to that date, title to Florida's freshwater sovereignty lands remained in the State itself and the Trustees had no authority to alienate them. Pet. 5a; App. D, infra, 54a.

7. In 1883 the Trustees, in their name, conveyed a swamp and overflowed lands deed to petitioner's predecessor in interest. The Trustees' deed encompassed the Peace River lands in question, but did not recite any express reservation of rights or title of the State in its sovereignty lands. Pet. App. 42a-51a. Petitioner Mobil Oil Corporation ("Mobil") alleges the deed from the State, which its predecessor in interest received in 1883, gave it title

⁷ See Trustees' Br., Mobil IV, App. 8, A.57-A.61. There was a general transfer of sovereignty lands to the Trustees in 1931. 1931 Fla. Laws Ch. 15642, § 1. (Ex. Sess.), codified as amended, Fla. Stat. § 253.03(l)(b) (1985).

to the river bottom of the Peace River.

8. Incontestably, there is not one sliver of land involved in this litigation which did not pass from the United States to Florida, either by virtue of Florida becoming a state in 1845 or, five years later, under the Swamp Act. This case involves no patent by the United States (or Spain) to a private entity or person either prior to the State acquiring title to the land under the equal-footing doctrine or by virtue of the Act.

9. The 11th Circuit in Mobil I, supra note 2, see App. C, infra, 3a-33a, summarizes the procedural history of this litigation to 1982 and speaks for itself.⁸ The 11th Circuit's decision

⁸ Mobil in its petition notes the existence of that decision and the federal court aspect of this litigation (Pet. 9), but asserts that "there is no inconsistency" between its petition and the 11th Circuit's remand order in Mobil I. Pet. 15 n.11. Mobil does not advise this Court as to the issues before the

is indispensable to an understanding of the background of the present case. Mobil so advised the Florida Supreme Court in this case. See Mobil's Ans. Brief at 1 n.2, Mobil IV.

10. Mobil commenced this action (Mobil IV) in April 1982 in Polk County Circuit Court, one month after the 11th Circuit's decision in Mobil I. Mobil received a summary judgment quieting title in its favor. The state court, relying in relevant part on Section 197.228(2), Florida Statutes (1981), held that the State, through the Trustees,

state court and the federal courts in Mobil I or the fact that Mobil took a position to those courts (and to this Court in its response to Coastal's petition for certiorari) diametrically opposite to that taken in the petition. See Brief of Plaintiff-Appellant Mobil Oil Corporation (at 19-27), Mobil Oil Corp. v. Coastal Petroleum Co., 671 F.2d 419 (11th Cir. 1982), followed in Brief in Opposition of Respondent Mobil Oil Corp. (at 4-7), Coastal Petroleum Co. v. Mobil Oil Corp., cert. denied, 459 U.S. 970 (1982).

had conveyed the disputed lands to Mobil's predecessor in 1883 by the swamp and overflow lands deed and the Trustees were consequently legally estopped, as a matter of Florida real property law, to rebut a presumption of non-navigability in such circumstances. Pet. App. 50a-51a.

That court expressly declined to decide the question of navigability in fact of the Peace River at Florida statehood in 1845. Pet. App. 48a; accord, Pet. App. 49a (same). For purposes of ruling on summary judgment, the trial court expressly assumed the disputed Peace River lands at statehood "were sovereignty in character" (Pet. App. 48a) and still today "is sovereignty land." Pet. App. 49a.

11. The Florida District Court of Appeal also "assume[d], arguendo, that the lands were sovereignty as opposed to swamp and overflowed lands. . . .,"

Pet. App. 38a. That court affirmed on the trial court's grounds, and held that jurisdiction rested in the Polk Circuit Court, Pet. App. 25a-33a, but certified three questions of Florida law to the Florida Supreme Court for decision:

I. Do the 1883 swamp and overflowed land deeds issued by the trustees include sovereignty lands below the ordinary high-water mark of navigable rivers?

II. Does the doctrine of legal estoppel or estoppel by deed apply to 1883 swamp and overflowed deeds barring the trustees' assertion of title to sovereignty lands?

III. Does the Marketable Record Title Act, chapter 712, Florida Statutes, operate to divest the Trustees of title to sovereignty lands below the ordinary high-water mark of navigable rivers?

Pet. App. 2a; see Pet. App. 40a-41a.⁹

⁹ Mobil acknowledges in its petition that it has rewritten the first of these questions in its petition, purportedly for "clarity." Pet. 11. In fact Mobil rewrote all the questions. A simple comparison of the real questions to those

12. Accepting for purposes of decision that "[w]e are dealing with navigable rivers not 'so-called lakes, ponds, swamps or overflowed lands [the operative words of Section 197.228(2), Florida Statutes (1981)],'" (Pet. App. 6a), the Florida Supreme Court answered each of these questions in the negative, quashed the decision of the District Court of Appeal (except as to the trial court's jurisdiction), and remanded to the lower Florida courts for further proceedings in this case. The issue of the navigability in fact of the Peace River in 1845 is the threshold fact question to be decided at the forthcoming trial on remand.

13. Thus Mobil now asks this Court to decide, and asserts this Court

set forth in the petition shows that "clarity" was not the purpose of the rewrite. See id.

presently has jurisdiction to decide, whether, on the facts of this case, determinations of the Secretary of Interior as to the character of land under the Swamp Act prior to its transfer to the State are, as a matter of federal law, conclusive against the State and the State's Trustees of its sovereignty lands which passed to the State on Statehood (the "statutory question"). This statutory question was never raised below.¹⁰

14. Mobil further asks this Court to decide, and asserts this Court

10 The statute and statutory question Mobil actually argued to the courts below were the applicability and effect of Section 197.228(2), Florida Statutes (1981). This statute is nowhere mentioned in the petition, although that statute was discussed by all the courts below, and was erroneously relied upon, at Mobil's instance, by the trial court and the district court of appeal as a basis of decision. See, e.g., Pet. App. 6a (Fla. S.Ct.); Pet. App. 37a (Fla. 2d DCA); Pet. App. 47a (trial court); Pet. App. 61a. (motion for rehearing). See also notes 18-20 infra.

presently has jurisdiction to decide, whether, on the facts of this case, a state judicial decision, which holds as a matter of state law that the State's Trustees' swamp and overflowed lands deeds to private parties do not include the State's sovereignty lands below the high water mark of navigable rivers, contravenes the Due Process Clause of the Fourteenth Amendment as an unconstitutional taking (the "constitutional question").

Mobil asserts as to the "constitutional question," "[I]t is sufficient that it was unambiguously presented to the State Supreme Court by motion for rehearing...." Pet. 16 (citing Pet. App. 63a-64a), in that "the right, title, or immunity under federal law emerge[d] only because 'the highest state court render[ed] an unexpected interpretation of state law or reverse[d] its prior

interpretation.'" Pet. 16 (citations omitted). Mobil also asserts that "the federal constitutional point was also raised, albeit in a minor way, in a pre-decisional brief in the Florida Supreme Court." Pet. 16.

These comments are contradictory and curious, since Mobil repeatedly raised the takings issue in the Florida Supreme Court in its answer brief on the merits prior to that court's ostensibly unforeseeable decision.¹¹ But Mobil, in the

11 Thus Mobil began its brief in that court with a quotation from a prior decision of the Florida Supreme Court: "If the State has conveyed property rights which it now needs, these can be reacquired through eminent domain; otherwise, legal estoppel is applicable and bars the Trustees' claim of ownership, subject to the rights specifically reserved in such conveyances." Mobil Ans. Br. at 1, Mobil IV (quoting Odom v. Deltona Corp., 341 So.2d 977, 989 (Fla. 1976) (Boyd, J.)).

See also: "The reason the present Trustees have never sought to reclassify the lands seems obvious; any such official action [to "reclassify

same brief, explicitly and expressly told that court it need not reach the federal question it argued would arise if the Trustees prevailed.¹²

15. In its motion for rehearing in the Florida Supreme Court (Pet. App.

the lands"], a century after the lands had been deeded into private ownership, would constitute a taking of private property without compensation in violation of the state and federal constitutions." Mobil Ans. Br. at 4, Mobil IV.

12 Mobil told the Florida Supreme Court, "Although this [Florida Supreme] Court need not reach the federal constitutional question that would arise if the Trustees were correct in their arguments, the point should be stated: for the State of Florida to reclassify lands a century after the conveyance into private ownership would be a clear taking of private property by the State without due process of law in violation of the Fifth Amendment to the United States Constitution if the result is to impair Mobil's title." Mobil Ans. Br. at 22, Mobil IV (citing four decisions of this Court) (emphasis added). Of course, the sole issue to the trial court, to be rendered at the forthcoming trial on remand, is whether Mobil has title to impair. If it does have title, there is no case pending which would impair it.

52a-64a), Mobil noted in a footnote, "Fifth Amendment federal protection under the 'taking' clause, applicable to state action through the Fourteenth Amendment, is also involved in these cases." Pet. App. 53a n.3. As its sixth (and only asserted federal) ground for rehearing, Mobil contended,

The majority opinion construes Florida law in a manner that effectively takes Mobil's property in violation of the Fifth Amendment to the United States Constitution, as made applicable to the State of Florida by the Fourteenth Amendment. The majority decision allows the executive branch to reclassify lands a century after their conveyance into private ownership.¹³

16. Thus did Mobil seek rehearing of a federal constitutional question

13 Pet. App. 63a. Mobil asserted, "As to the first point, the state classified the lands at issue as swamp and overflowed lands under legislatively directed procedures during the 1880s." Pet. App. 62a (emphasis added); but cf. Pet. 4 (which asserts the Secretary of Interior made this classification).

never reached or decided by the Florida Supreme Court or by any other Florida court in this case (before or after remand)--a constitutional question Mobil had counseled the Florida Supreme Court not to reach in deciding the three certified questions of Florida law before it.

This question is nevertheless ostensibly framed by Mobil in this Court "as one[s] in which 'reversal of the state court on the federal issue would be preclusive of any further litigation.'"¹⁴ Mobil does not explain how a court can be reversed on a federal issue it was asked not to, and did not, reach.

14 Pet. 18 (emphasis added) (quoting out of context Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 482-83 (1975), where the state court had reached the new federal issue on rehearing).

REASONS FOR DENYING THE WRIT

In its present posture before this Court, this is a state case to be decided by state law in accordance with this Court's decision in Corvallis, supra. This Court therefore is without jurisdiction to decide it. But even if there were jurisdiction to review the decision below, the petition is without merit for the Florida Supreme Court correctly decided the certified questions of state law before it.

Here, as the 11th Circuit concluded in Mobil I, supra, "[T]here is no question in this case whether, in the sense obviously intended by Corvallis, title to the disputed land has passed [from the United States]; the parties agree that it has. The issue is whether, under Florida law, the [1883] deed to Mobil's predecessor conveyed the dis-

puted property."¹⁵ Florida law is for Florida courts.

I. PETITIONER'S ARGUMENTS ARE WITHOUT MERIT, WHETHER OR NOT THE DECISION BELOW WAS CORRECT.

A. The Statutory Question.

Mobil contends for the first time in this Court that determinations as to the character of land under the Swamp Act by the Secretary of the Inte-

15 Mobil I, 671 F.2d at 425 (11th Cir.) (emphasis in original and brackets added), cert. denied, 459 U.S. 970 (1982). App. C, infra, 27a. The 7th Circuit recently reaffirmed this Court's teaching, applicable equally here, that statehood is: "a grant both of property rights and of sovereign power" and "[w]hether the State retains in trust for the public" the title acquired at statehood is, "entirely a matter of [state] law, subject only to the exercise by the United States of one of its constitutional powers." Wisconsin v. Baker, supra, 698 F.2d at 1327 (citing Montana v. United States, supra; Corvallis, supra, United States v. Holt State Bank, 270 U.S. 49, 54-55 (1926); Shiveley v. Bowlby, 152 U.S. 1, 40 (1894); Wilcox, supra, at 517; Mobil I, supra; Heirs of Burat v. Board of Levee Commissioners, 496 F.2d 1336 (5th Cir. 1974)).

rior are conclusive, as a matter of federal law, in a state's subsequent disposition of state-owned property. This contention is not true and was disposed of by this Court in Corvallis. More immediately, this contention was never raised below and this Court thus has no jurisdiction to consider its accuracy.

The effect of determinations by the Secretary of Interior was decided by this Court a century ago in Wright v. Roseberry, 121 U.S. 488 (1887). This Court there held that the federal patents issued pursuant to that Act were "conclusive against any collateral attacks." Wright at 501 (emphasis added). This holding is explained in this Court's decisions in Borax Consolidated, Ltd. v. City of Los Angeles, 296 U.S. 10 (1935)

16 As explained in Summa, two situations are encountered in title battles between a state claiming under the equal footing doctrine, on the one hand, and a person claiming under federal land patents, on the other. See Summa, 466 U.S. at 205-06. In one situation (Borax), the private claimant claims land as a successor in interest to a federal patentee. This Court held the federal government had no power to transfer land already owned by the state as sovereignty land, Borax at 17-19, cited in Corvallis at 376; in a second situation (Summa), the federal government purports to transfer land it has acquired from another sovereign (Mexico) and has not yet passed to a state. This case is similar to the first situation explained in Corvallis. But whereas the defendant private claimant in Corvallis claimed under two federal patents to riparian lands, see, e.g., State ex rel. State Land Board v. Corvallis Sand and Gravel Company, 283 Ore. 147, 582 P.2d 1352, 1356 n.10 (1978) (on remand from this Court), for its avulsion theory, no one here claims title directly under any federal patent. The title battle here is between a State claiming under the equal footing doctrine, on the one hand, and a successor to a private grantee claiming under a State's Trustees' deed, on the other hand. A fortiori, in this situation, state law controls.

Mobil is claiming title to land pursuant to a State's Trustees' 1883 deed, issued in turn, pursuant to an 1855 state statutory grant to the Trustees of swamp land which was part of the land covered by a federal patent issued to Florida (effective 1850), after Florida became a state and had thus already acquired title to riverbottoms under the equal footing doctrine. While, "in the absence of fraud the Secretary's determination of the status of the land, one way or the other, is conclusive and not subject to collateral attack and relitigation in the Courts," Mays v. Kirk, 414 F.2d 131, 135 (5th Cir. 1969) (emphasis added) (citing French v. Fyan, 93 U.S. 169 (1876), and Wright, supra), no substantial federal question appears

in a state's treatment of its subsequent disposition thereof. Mays at 132-35.¹⁷

That no federal question is here involved has been acknowledged by Mobil for ten years in this litigation (prior to the petition). Thus, relying on Mays, supra, Heirs of Burat, supra, and Charlotte Harbor Phosphate, supra (which also involved a title dispute between phosphate interests and the Trustees over the Peace River), Mobil has heretofore repeatedly taken the position that once it is conceded that title has passed out of the United States, state courts are the proper forum for

17 "Accordingly, although the swamps-and-overflowed determination might in the abstract have provided a sufficient jurisdictional base, we find that the Supreme Court's removal of that question from the ambit of judicial review left no unsettled construction of that statute." Mays supra; at 136; see Heirs of Burat, supra; Florida v. Charlotte Harbor Phosphate Co., 74 F. 578 (5th Cir. 1896).

resolution of state land titles under state law.¹⁸ That position is correct and the Florida Supreme Court is the ultimate forum for such resolution.

The two fundamental omissions in the petition's presentation of the putative statutory Question Presented are:

1. . In the courts below, Mobil actually argued, "The law of Florida, . . . effectively affirms and incorporates the corresponding federal doctrine that in the administration of the public land

¹⁸ See Brief of Plaintiff-Appellant Mobil Oil Corp. at 19-27, Mobil Oil Corp. v. Coastal Petroleum Co., 671 F.2d 419 (11th Cir. 1982), followed in Brief in Opposition of Respondent Mobil Oil Corp. at 4-7, Coastal Petroleum Co. v. Mobil Oil Corp., cert. denied, 459 U.S. 970 (1982). "Were it otherwise, anyone claiming title to real estate in the Western United States could bring suit in federal court since title to all lands in those parts of the nation is traceable to a federal grant or law." Wisconsin v. Baker, supra, at 1327 (citing Shoshone Mining Co. v. Rutter, 177 U.S. 505, 507 (1900)).

system factual determinations of the federal land department are final, including factual determination as to the physical character of the lands being 'swamps and overflowed lands.'"¹⁹

Thus, Mobil below argued that Florida law controls;²⁰ no federal law or statute was argued by Mobil in the courts below (except as Mobil argued Florida had adopted, as its law, certain federal doctrine).²¹ Mobil cannot now

19 Mobil Ans. Br. at 12-13, Mobil IV (emphasis added); accord Mobil's Memorandum of Law in Support of its Motion for Summary Judgment, Mobil IV (filed May 17, 1982) (R.57-104). See note 10 supra & App. A, infra, 1a.

20 Mobil also did so in the 11th Circuit, which concluded Florida law merely looks to federal law "as a criterion by which to decide a state law [title dispute] question." Mobil Oil Corp. v. Coastal Petroleum Co., 671 F.2d 419, 426 (11th Cir. 1982) (App. C, infra, 32a), cert. denied, 459 U.S. 970 (1982).

21 The petition only points to "citations" (by Mobil in the courts below) of decisions of this Court to support its assertion it somehow raised the statu-

attempt to create in this Court a claim of federal right never set up in the courts below. See 28 U.S.C. § 1257(3); S.Ct.R. 21.1(h).

2. Mobil makes no attempt to explain what is meant by a "collateral attack" in Wright. What appears to be prohibited in Wright is a challenge to the Secretary's determination by third parties. But this case, at least in its present posture, involves neither a direct nor a collateral attack by anyone against the Secretary's determination (whatever that determination is deemed or assumed to be), because all -- most of all Mobil as movant on summary judgment -- must accept, for purposes thereof, that the Peace River was and is navigable.

tory Question Presented below (Pet. 16), but omits the State statutory law context in which those citations appeared in Mobil's briefs and memoranda in the courts below. See generally note 10, supra.

All agree the navigability in fact of the Peace River at Florida statehood (a federal question under Corvallis and Wilcox, supra) has yet to be determined by the trial court. And the significance of that determination, as the 11th Circuit (and Mobil) said in Mobil I, is solely one of state law:

The sole significance in this case of the navigability of the Peace River in 1845 is that the State of Florida elects to denominate lands acquired from the United States as sovereignty lands and to restrict the alienability of those lands.²²

For as this Court reaffirmed in Wilson v. Omaha Indian Tribe, 442 U.S. 653, 669 (1979), "[T]his Court held [in Corvallis] that, absent an overriding federal interest [such as a treaty obligation or interstate compact] the laws

22 Mobil I, 671 F.2d at 424 (11th Cir. 1982) (emphasis added) (App. C, infra, 21a.). See also Wisconsin v. Baker, supra, at 1327.

of the several states determine the ownership of the banks and shores of waterways." The only applicable claim of federal right here is the equal-footing origin of the State's title.²³ See generally Wilson at 2539. No federal interest is implicated in the Trustees' title from the State. Neither is any federal interest implicated in Mobil's predecessor's deed from the Trustees. Nor is any federal interest implicated in any questions regarding the Trustees' status and authority vel non as an independent agency of the State. See generally App. E, infra, at 66a n.1.

23 The Trustees do not understand, and therefore do not accept, the 11th Circuit's dictum in Mobil I that "neither party asserts navigability as the basis of a right arising under the Constitution or laws of the United States." 671 F.2d at 426. (App. C, infra, 32a). Certainly the Trustees did. 671 F.2d at 422 & n. 6 (App. C, infra, 15a); accord, 695 F.2d at 1316 & n.2 (App. E, infra, 32a). The decision below so recognized. Pet. App. 3a ("uncontroverted legal proposition").

To be sure, Corvallis itself recognized that federal law would continue to apply if "there were present some other principle of federal law requiring state law to be displaced."²⁴ In this case there is no federal principle requiring such displacement; certainly, the United States has no title claim. And "[t]he Corvallis rule -- that state law governs -- applies where the dispute over the legal effect of a shifting riverbed does not involve claims of title by a federal instrumentality." California ex rel. State Lands Comm'n, supra, 457 U.S. at 289 (Rehnquist, J., joined by

²⁴ California ex rel. State Lands Comm'n v. United States, 457 U.S. 273, 281 (1982). And Wilson, supra, "made clear that Corvallis also does not apply 'where the [United States] government has never parted with title and its interest in the property continues.'" California ex rel. State Lands Comm'n, 457 U.S. at 282.

Stevens, J., and O'Connor, J., concurring in the judgment).

B. The Constitutional Question.

Mobil's constitutional contention -- that the decision below contravenes the Due Process Clause of the Fourteenth Amendment as an unconstitutional taking -- is without merit.

First, Mobil has denied the record to assert that the constitutional issue was not foreseeable until the Florida Supreme Court ruled. This assertion is inherently implausible in light of questions certified to that court for answer; in any case, the record contradicts that explanation. See Statement, supra, at ¶¶14-16. Apparently Mobil makes its "unforeseeability" explanation to hide the fact that Mobil asked the Court below not to consider the issue. This request was wise since the issue

was not then (and is not now) ripe for consideration. A "taking" depends on a title to "take" and the existence vel non of title is to be resolved at the forthcoming trial.

Second, as shown below (Argument II, infra), the Florida Supreme Court's decision was neither arbitrary nor unpredictable, and the decisions of this Court cited by Mobil to justify this Court's review of the decision below are inapposite and readily distinguishable.²⁵

25 Mobil asserts that this Court has, "in a variety of contexts, [reviewed] the decision of a state court . . . to determine whether it has made such an arbitrary or unpredictable declaration of local law as to deny due process or otherwise deprive the petitioner of a federal right." Pet. 24. None of the cases Mobil relies on to support this proposition are on point. Five of the cases cited involved a state court decision, ostensibly based on independent grounds of state law, that arbitrarily deprived an insular group, usually a racial minority, of a federal right. See Ward v. Love County, 253 U.S. 17

Third, none of the procedural hurdles to asserting and arguing a ripe takings claim under the Fifth and Four-

(1920); Indiana ex rel. Anderson v. Brand, 303 U.S. 95 (1938); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958); NAACP v. Alabama, 377 U.S. 288 (1964); Bouie v. City of Columbia, 378 U.S. 347 (1964). Two of the cases cited involved the express reversal of precedent, neither arbitrary nor unpredictable, in an unsettled area of state law. See Demorest v. City Bank Co., 321 U.S. 21 (1944); Muhlker v. Harlem R.R. Co., 197 U.S. 544 (1905). No Florida court has expressly overruled precedent in the instant case, and Mobil's suggestion that the Florida Supreme Court has implicitly "made new law" by "judicial reinterpretation," Pet. 23, 24, even if true, is not a basis for review in this Court that finds support in any case law.

One case cited by Mobil, Georgia Ry. & Power Co. v. Town of Decatur, 262 U.S. 432 (1923), held that a state commission's decision that a railway transit company was contractually precluded from raising its fares and charging for transfers did not impair an obligation of contract or deny equal protection of the law. The case did not involve a due process or takings claim and the decision in the state court was not "arbitrary or unpredictable." (Georgia Railway was decided in this Court on writ of error; a petition for writ of certiorari was denied. 262 U.S. at 436, 440.)

teenth Amendments has been met. See, e.g., Williamson County Regional Planning Comm'n v. Hamilton Bank, ____ U.S. ___, 105 S.Ct. 3108 (1985) (finality requirements in regulatory takings cases); MacDonald, Sommer and Frates v. Yolo County, ____ U.S. ___, 106 S.Ct. 2561 (1986) (same).²⁶ As noted, the factual predicate for a determination of Mobil's title remains for the forthcoming trial.

Fourth, assuming the constitutional question was properly presented and preserved in the courts below (contra, Statement, supra), it remains on remand. The decision below did not decide the threshold question (in any alleged takings dispute) of title. The decision below only recognizes the right of the Trustees

26 Williamson was the basis for this Court vacating and remanding Robinson v. Ariyoshi, 753 F.2d 1468 (9th Cir. 1985), relied upon by Mobil. See ____ U.S. ___, 105 S.Ct. at 3269.

to establish title to those disputed lands as sovereignty lands if they can. None of the courts below has reached the question of navigability in fact. Nor have several of Mobil's defenses to the Trustee's claim of title been reached. In the event the Trustees prevail on all those issues at trial, Mobil will have ample opportunity to seek appellate review thereof.²⁷

Implicitly recognizing that "title" remains for trial, Mobil also argues that the decision below affects its "security of title. . . that has already been taken without compensation."

27 The Trustees do not maintain that a ripe takings question could never arise if the Trustees were to prevail on all title issues in the Florida courts; only that any such question may never arise or, alternatively, may become moot before it is ever reached. Contrary to Mobil's suggestion, no issue of judicial or executive branch reclassification of land is presented or intimated in the decision below.

Pet. 17 This assertion is unsupported by any authority in Mobil's petition. Further, this assertion is nothing more than a contention that any time a court fails to grant a summary judgment against a sovereign regarding real property, the property is "taken" because the requirement to go to trial impairs "security of title" (which, presumably, imposes on the court denying the summary judgment an obligation to pay compensation). It is hardly surprising Mobil can locate no authority for such a contention.

If, despite the foregoing, Mobil believes the decision below contravenes the Due Process Clause of the Fourteenth Amendment, the Trustees submit Mobil should present such arguments in the courts below. This Court should decline Mobil's invitation to decide them, in the first instance.

II. THE COURT BELOW FULLY CONSIDERED AND CORRECTLY DECIDED THE THREE CERTIFIED QUESTIONS OF STATE LAW BEFORE IT.

The First Certified Question.

In answer to the first certified question, the court below, relying on longstanding Florida precedents, concluded the 1883 Trustees' swamp and overflowed lands deed to Mobil's predecessor in interest does not include sovereignty lands below the ordinary high-water mark of navigable rivers. As stated in the decision below:

We [the Florida Supreme Court] answered the first certified question in the negative when we held in Martin [v. Busch, 93 Fla. 535, 573, 112 So. 274, 286-87 (1927)] that: ... "The subsequent vesting of title to sovereignty lands in the Trustees for State purposes under the Acts of 1919 or other statutes does not make the title to sovereignty land inure to claimants under a previous conveyance of swamp and overflowed lands by the State Trustees who then had no authority to convey such sovereignty lands and did not attempt or

intend to convey sovereignty lands."²⁸

The decision below followed the axiomatic principle of Martin, supra, and Pierce, supra, that as a matter of Florida law those who took swamp and overflowed lands deeds from the Trustees granted prior to the vesting of title of sovereignty lands in the Trustees took with notice that the "grant did not and could not include any sovereignty

²⁸ Pet. App. 5a-6a (emphasis added). Accord Pierce v. Warren, 47 So.2d 857, 858-59 (Fla. 1950), cert. denied, 341 U.S. 914 (1951) ("If the Trustees of the Internal Improvement Fund actually conveyed 'sovereignty lands,' believing them to be 'swamp and overflowed lands,' their mistake, however, innocent, would not supply the power they lacked."); see Pierce at 858 ("[T]he basic question for us to determine is whether the trustees attempted to convey 'sovereignty lands' which they could not have done before the enactment of Chapter 7304, Laws of Florida, Act of 1917 [now Fla. Stat. § 253.12(1) (1985)], or did deed 'swamp and overflowed lands,' which they were empowered to do.").

land."²⁹ This has been hornbook law in Florida for decades.³⁰

The question whether the State qua the State, which held title to fresh-

29 Pierce, supra, at 860. The decision below thus made the same doctrinal distinction on state law grounds recognized by Florida courts throughout the Trustees' history: "The title to sovereignty lands at this point [i.e., in the 1850's and at the time of the 1883 deeds] remained in the legislature as a public trust." Pet. App. 5a. See State v. Black River Phosphate Co., 32 Fla. 82, 13 So. 640 (1893); State ex rel. Ellis v. Gerbing, 56 Fla. 603, 608, 47 So. 353, 355 (1908); Broward v. Mabry, 58 Fla. 398, 50 So. 826 (1909).

30 See, e.g., 42 Fla.Jur.2d Public Lands § 60 ("Invalid Sales by Trustees") (1983). In 1967 the Florida Legislature codified the distinction taken in Martin and Pierce with respect to conveyances by the Trustees after vesting of title in the Trustees: "All conveyances of sovereignty lands or fill material heretofore made by the Board of Trustees of the Internal Improvement Trust Fund of Florida subsequent to the enactment of Chapter 6451, Act of 1913, Chapter 7304, Act of 1917, and Chapter 57-362, as amended, are hereby ratified, confirmed, and validated in all respects." 1967 Fla. Laws Ch. 67-393, § 1(2), now codified, Fla. Stat. § 253.12(8) (1985) (emphasis added).

water sovereignty lands in itself prior to 1969, could ever convey freshwater sovereignty lands held in trust to private parties is not presented. See Fla. Const. art. X, § 11 ("Sovereignty Lands"). The first certified question asked only whether the Trustees could do so in 1883. The negative answer in the decision below was wholly foreseeable.³¹

The decision below, in analyzing the first certified question, observed, "It is important to recognize that Con-

31 All the foregoing Florida cases recognize the special character of sovereignty lands under Florida law. All of them trace their intellectual origins to Black River Phosphate, supra, and Gerbing, supra, which, in turn, followed this Court's equal footing principles and the public trust doctrine with respect to the state's title to lands under navigable waters. See Black River Phosphate, supra, 13 So. at 644 (citing Pollard's Lessee, supra; Weber v. Board of Harbor Comm'rs, 85 U.S. (18 Wall.) 57 (1873); and Martin, supra,); accord Gerbing, supra, 47 So. at 355-56 (quoting 1845 Act of Statehood and citing Illinois Cent. R. R. Co. v. Illinois, 146 U.S. 387 (1892)).

gress had no intent or power to convey state sovereignty lands through such [swamp and overflow lands] acts or patents and that land surveys conducted in connection with these conveyances of swamp and overflowed lands are not conclusive against the state as to the meander boundaries of state sovereignty lands."

Pet. App. 4a.³²

A fortiori, the Trustees could not convey to private parties sovereignty lands over which the Trustees had no title or authority under Florida law

32 For this proposition the decision below relied on Borax Consolidated, Ltd. v. City of Los Angeles, 296 U.S. 10, 16 (1935), reh'q denied, 296 U.S. 664 (1936), and prior decisions of this Court cited therein, as well as Martin, supra. This proposition is further supported by the explicit language of United States v. O'Donnell, 303 U.S. 501, 509 (1938), "The Swamp Lands Act of 1850 was effective to transfer an interest in the lands described in the Act, only so far as they were part of the public domain of the United States and thus subject to the disposal of Congress." (Emphasis added). See note 40, infra.

(prior to 1969). The Florida Supreme Court had explicitly so held at least as early as 1908. Gerbing, supra, 56 Fla. at 612, 47 So. at 356.³³

The Second Certified Question.

The decision below, in response to the second certified question, held that the doctrine of legal estoppel or estoppel by deed does not apply to the 1883 swamp and overflowed lands deed, and consequently does not bar the Trustees' assertion

33 In 1979 the United States District Court for the Northern District of Florida, in International Minerals, supra, a diversity jurisdiction case, reached the same conclusions as to the Trustees' lack of title and authority prior to 1969. See text infra — App. D, infra.

The Fifth Circuit had held, at least as early as 1896, that title disputes between private claimants and the Trustees over the Peace River belonged in State court and must be decided by State law. Florida v. Charlotte Harbor Phosphate Co., supra.

of title to sovereignty lands in the lower Florida courts.³⁴

Mobil asserts that the "fundamental doctrine of legal estoppel" ought to apply here. Pet. 22. Mobil mistakenly asserts, "[T]here is no doubt these principles were [previously] deemed fully

34 In so holding, the Court below observed, "This question was also addressed and answered in Martin, as the quotations above show." Pet. App. 7a:

Not only is there no legal estoppel to the Trustees' claim of ownership in sovereignty lands, but the Trustees are prohibited by case law from surrendering state title to sovereignty lands based on a prior conveyance of swamp and overflowed lands. . . . The fact that a deed of swamp and overflowed lands does not explicitly exempt sovereignty lands from the conveyance does not show that the Trustees intended to convey sovereignty lands encompassed within the swamp and overflowed lands being conveyed. . . . Martin, 93 Fla. at 569-73, 112 So. at 285-87.

Pet. App. 7a; accord, App. D, infra, 54a-55a.

applicable by the Florida Supreme Court against a claim that the conveyance erroneously included 'sovereignty lands.'"
Pet. 22 (brackets added and citations omitted). The Florida estoppel cases relied upon by Mobil in the petition are all distinguishable on their facts, as demonstrated in Coastal Petroleum Co. v. International Minerals & Chemical Corp., supra.³⁵

In 1927 the Florida Supreme Court held in Martin that a swamplands grantee takes with double notice, "The grantee takes with notice that the convey-

35 Rpt. in Trustees' Br., Mobil IV, App. 9 (App. D, infra, 34a-63a). Mobil's Florida counsel here represented defendants in that case. Mobil's counsel of record in this Court represented these defendants in a subsequent consolidated appeal of a later injunction in that case. See generally Coastal Petroleum Co. v. U.S.S. Agri-Chemicals, 695 F.2d 1314, 1315, 1319 (11th Cir. 1983) (App. E, infra, 63a-84a) (holding, inter alia, that International Minerals, supra, constituted a non-appealable interlocutory order).

ance of swamp and overflowed land does not in law cover any sovereignty lands, and that the trustees of the swamp and overflowed lands as such have no authority to convey sovereignty lands." 93 Fla. at 570, 112 So. at 285-86 (emphasis added).

The Secretary of the Interior himself has never claimed, and would not claim, power to convey by patent to a State sovereignty lands always owned, by definition, by that state. This Court has always so held.³⁶ In holding that

36 "[B]ecause control over the property underlying navigable waters is so strongly identified with the sovereign power of the government, United States v. Oregon, [295 U.S. 1, 13 (1935)], it will not be held that the United States has conveyed such land except because of 'some international duty or public exigency.'" Montana v. United States, 450 U.S. 544, 552 (1981) (quoting United States v. Holt State Bank, 270 U.S. 49, 55 (1926)).

Indeed, "The State is probably correct in stating that Congress could not, without making provision for payment or compensation, pass a law depriving a

the Trustees are not estopped to assert and attempt to prove that the disputed Peace River lands are in fact sovereignty lands, the decision below does no more than reflect the same concern for the sovereign rights of the State's people and the same rules of deed construction that have been long recognized by this Court.³⁷

State of land vested in it by the Constitution." Block v. North Dakota ex rel. Board of University & School Lands, 461 U.S. 273, 291 (1983).

³⁷ See, e.g., United States v. Oregon, supra, at 14 (strong presumption against alienation of sovereignty lands); Martin v. Lessee of Waddell, 41 U.S. (16 Pet.) 367, 410-11 (1842) (principle that people of each state in their sovereign character own all their navigable waters dates to the Revolution itself, "subject only to their rights since surrendered by the Constitution to the general government"). See also The Charles River Bridge Case, 36 U.S. (11 Pet.) 420 (1837) (state charter grants must be construed narrowly; no implied rights of private grantees assumed; ambiguities must be construed in favor of state).

In the procedural posture here, as in the Northern District of Florida in 1979 in International Minerals, supra, at 9-10:

Unlike Odom, it has not yet been determined whether the lands in dispute are non-sovereign and therefore indisputably capable of conveyance to private parties. If sovereign, it is evident that the Trustees were wholly without authority to alienate them until 1969, a date subsequent to the conveyances to defendants' predecessors in interest. The state may not be estopped by the unauthorized acts of its officers.

There is another, perhaps even more compelling reason why the Trustees' deeds cannot work an estoppel against the State of Florida. The deeds contain no indication that the state intended to convey title to sovereign lands. . . . It is clear, however, that under the public trust doctrine the intent to alienate trust property must be clearly stated. Martin v. Busch, supra. . . . Estoppel by deed is therefore inapplicable.

(App. D, infra, 54a-55a) (some case citations omitted).

The Third Certified Question.

"The final certified question is whether the Marketable Record Title Act (MRTA), Chapter 712, Florida Statutes, operates to divest the state of title to sovereignty lands." Pet. App. 7a-8a. The court below answered this question in the negative, "conclud[ing] that the legislature did not intend to make MRTA applicable to sovereignty lands." Pet. App. 9a.³⁸

38 The court below noted language to the contrary in that court's prior decision in Odom v. Deltona Corp., 341 So.2d 977 (Fla. 1976), which had been relied upon by Mobil and the lower Florida courts in this case. The decision below analyzed Odom, determined "[t]his reliance [on Odom] is misplaced," Pet. App. 8a, concluding that Odom was entirely distinguishable on its facts (based on Odom's "factual determination that the small lakes and ponds at issue were non-navigable, non-sovereignty lands"). Id. The decision below explained, "The statements [in Odom] concerning the effect of MRTA on navigable waterbeds were dicta and are non-binding in the instant case inasmuch as there were no navigable waterbeds at issue in Odom." Id. That court also observed that its post-Odom decision

After examining (in response to the first two certified questions) "the well established law that prior conveyances did not convey sovereignty lands encompassed within swamp and overflowed lands being conveyed," Pet. App. 9a, the decision below "assume[d] that the legislature knew this well-established law when it enacted MRTA." Id.

Mobil disputes the assumption of the court below, but the decision below affords ample support for its interpretation of MRTA in light of the constitutional codification of the public trust doctrine in the Florida Constitution:

We are persuaded that had the legislature intended to revoke the public trust doctrine by

in Askew v. Sonson, 409 So.2d 7 (Fla. 1981), rendered prior to the filing of this action, expressly "declined to rule 'on the question whether the title to what had been sovereignty lands could be perfected by MRTA prior to the effective date of the 1978 amendment.' Id. [Askew] at 9." Pet. App. 8a.

making MRTA applicable to sovereignty lands, it would have, by special reference to sovereignty lands, given some indication that it recognized the epochal nature of such restoration. We see nothing, in the act itself or the legislative history presented to us suggesting that the legislature intended to casually dispose of irreplaceable public assets. The legislative purpose of simplifying and facilitating land title transactions does not require that the title to navigable waters be vested in private interests.

Pet. App. 9a.

Mobil and amicus Florida Land Title Association, Inc. ("FLTA") argue, in effect, that the court below overruled its 1976 decision in Odom, supra. This is not correct as the decision below explained, noting the specific reservation of the issue in its 1981 decision in Askew v. Sonson, supra. Pet. App. 8a. But even if one concluded the decision below did overrule Odom, decided ten years

earlier, no rights of Mobil (or FLTA) are denied or impaired.³⁹

CONCLUSION

The Florida Supreme Court thus correctly decided the three certified questions of state law before it.⁴⁰

³⁹ A trial on the issue of navigability vel non is hardly more difficult in 1987 than it was in the late 1970s when Mobil and other phosphate interests litigated the same issues with the same parties over the same Peace River in sundry state and federal courts.

Moreover Mobil did not act in reliance on Odom. See also App. D, infra, 34a-62a. See generally, App. E., infra 82a. Mobil purchased the subject land before Odom was decided and commenced this action after the Florida Supreme Court in Askew v. Sonson, supra, specially declined to rule whether Odom applied in light of its factual context (small ponds and lakes) and the statute (Section 198.228(2), Florida Statutes (1975)) which applied to that factual context.

⁴⁰ This Court has long held "the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms." E.g., United States Trust Co. v. New Jersey, 431 U.S. 1, 19 n.17

Neither that court nor the lower Florida courts considered the putative federal Questions Presented in the petition. Nor should this Court consider them. The ostensible statutory Question Presented is nothing more than a failed attempt to recast Mobil's tautological argument under Section 197.228(2), Florida Statutes (1981). Independently, the petition, in its framing of the supposed constitutional Question Presented, denies the record, ignores both Florida precedent

(1977) (citing prior decisions of the Court), reh'q denied, 431 U.S. 975 (1977). Mobil's predecessor had record and constructive notice of this Court's decision in Barney v. Keokuk, 94 U.S. (4 Otto 324) (1877), which held that the state's title included the beds of all waters, which upon admission to the union, were actually navigable, whether or not they were affected by the tide. Therefore Mobil's predecessor knew or should have known in 1883 that no federal patent could have conveyed sovereignty lands to the State. See State ex rel. State Land Board v. Corvallis Sand and Gravel Co., 283 Or. 147, 582 P.2d 1352, 1356 (1978) (on remand from this Court).

and the nature of this action, and suffers from an erroneous major premise. Mobil can claim no uncompensated taking has occurred, in that, (i) Mobil has not yet been, and indeed may never be, divested of title to the Peace River Property on trial, and (ii) Mobil has not "sought compensation [for a taking] through the procedures the State has provided for doing so. . . ." MacDonald at 3121.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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Dated: January 6, 1987

6867.98-16

Appendix A

Navigable waters in this state shall not be held to extend to any permanent or transient waters in the form of so-called lakes, ponds, swamps or overflowed lands, lying over and upon areas which have heretofore been conveyed to private individuals by the United States or by the state without reservation of public rights in and to said waters.

Fla. Stat. § 197.228(2, (1981), renumbered, Fla. Stat. § 253.141(2) (1985).

-1a-

Appendix B

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

. . .
. . .

3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

28 U.S.C. § 1257(3) (emphasis added).

-2a-

APPENDIX C
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 81-5533, 81-5812

MOBIL OIL CORPORATION,)
a New York Corporation,)
Plaintiff-Appellant,)
v.)
COASTAL PETROLEUM COMPANY,)
a Florida Corporation,)
Defendant-Appellee.)
MOBIL OIL CORPORATION,)
a New York Corporation,)
Plaintiff-Appellant,)
v.)
COASTAL PETROLEUM COMPANY,)
A Florida Corporation, and)
The State of Florida Depart-)
ment of Natural Resources)
and The Board of Trustees)
of the Internal Improvement)
Trust Fund of the State)
of Florida,)
Defendants-Appellees.)

Appeals from the United States District
Court for the Northern District of
Florida

March 4, 1982

Before MORGAN, TJOFLAT and JOHNSON,
Circuit Judges.

TJOFLAT, Circuit Judge:

I.

These consolidated appeals arise out of a lawsuit whose complex procedural history we need only summarize. On September 24, 1976, Mobil Oil Corporation (Mobil) filed a complaint in the Circuit Court for Leon County, Florida, seeking a declaration of its rights under an oil exploration agreement with Coastal Petroleum Company (Coastal). Coastal responded with five counterclaims, the second of which alleged Mobil's conversion of phosphate from lands owned by the State of Florida and leased by Coastal. Coastal joined as a necessary party to the second counterclaim the Trustees of the Internal Improvement

Trust Fund of the State of Florida (the Trustees), who hold title to state lands.

On November 20, 1979, Mobil filed a counterclaim (the reply counterclaim) against Coastal and the Trustees, seeking a declaration of the parties' rights based on an 1862 deed from the Trustees to Mobil's predecessor in interest encompassing eighty acres of unmined land coursed by the Peace River. On December 20, 1979, the Trustees and Coastal (appellees) removed the case to the district court, asserting that Mobil's reply counterclaim raised a substantial federal question by challenging the Trustees' sovereignty claim to the subject land. Mobil moved to remand the case to the state court, but the district court denied the motion.

In December of 1980, Coastal's fourth counterclaim was tried in the district court, resulting in a final

judgment on a jury verdict in favor of Coastal. In No. 81-5533, Mobil appeals that judgment, contending that the district court lacked subject matter jurisdiction of the reply counterclaim, and therefore of the case, and that the district court committed error in the conduct of the trial.¹

On July 29, 1981, Coastal moved the district court for an injunction to prohibit Mobil from proceeding further in a related state court quiet title action. The district court entered an

1 In addition to its jurisdictional contention, Mobil argues that the record contains no evidence to support the jury's assessment of compensatory damages and that the district court erred in ruling that the Mobil-Coastal oil exploration agreement required Mobil to furnish a geochemical report to Coastal; in instructing the jury that it could award more than nominal damages under Count One of Coastal's fourth counter-claim; in submitting a misrepresentation claim to the jury; and in submitting Coastal's request for punitive damages to the jury.

order enjoining the parties from filing or further litigating in any state or federal court any lawsuit which would require the determination of any legal or factual issue forming the basis of this lawsuit or necessarily relating thereto. In No. 81-5812, Mobil appeals the injunction, contending that it is prohibited by the Anti-Injunction Act, 28 U.S.C. § 2283 (1976), and, again, challenging the subject matter jurisdiction of the district court. Because we conclude that the district court lacks jurisdiction of this case, we reach none of the other issues raised in these consolidated appeals.

II.

The federal removal statute, 28 U.S.C. § 1441 (1976), permits defendants to remove state court civil actions of which the federal courts have

original jurisdiction.² The jurisdictional question presented in this case is whether Mobil's reply counterclaim arises under federal law within the meaning of 28 U.S.C.A. § 1331(a) (West Supp.

² 28 U.S.C. § 1441 (1976) provides in pertinent part:

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

1980)³ so as to be removable.⁴ The reply counterclaim alleges in relevant part:

ALLEGATIONS COMMON TO ALL COUNTS

1. This is an action for declaratory judgment pursuant to Chapter 86, Florida Statutes. The subject matter of the controversy exceeds \$2,500 in value.

2. MOBIL owns, and is in possession of the SE 1/4 of NW 1/4 and

³ 28 U.S.C.A. § 1331(a) (West Supp. 1980) provides: The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

⁴ No other claim in the case is asserted to arise under federal law. The Trustees correctly concede that the action could not be removed on diversity grounds because, assuming arquendo that the Trustees are a citizen for purposes of diversity, removal on diversity grounds is permitted only if no defendant is a resident of the state where the action was brought. See 28 U.S.C. § 1441(b), supra, note 2. Coastal's argument that Mobil waived the right to challenge removal on diversity grounds is meritless.

SW 1/4 of NE 1/4 of Section 23, Township 31 South, Range 25 East, Polk County, Florida. The Peace River courses a part of these lands and parts lie within the swamps that adjoin the river.

3. MOBIL's ownership is based on a continuous chain of title which began with a deed from the State of Florida to Henry S. Seward dated November 20, 1862. The deed ... does not mention any rivers, waterbodies or watercourses nor does it reserve any interest in STATE.

4. STATE and COASTAL have asserted in this suit that MOBIL has converted phosphate by having mined certain lands allegedly owned by STATE and that are subject to a mineral lease between STATE and COASTAL. . . . The lands described in paragraph 2, above, have not been mined and, accordingly, are not among the lands from which phosphate has allegedly been converted.

5. The conversion claims of STATE and COASTAL are bottomed on the contention that the lands from which the phosphate was allegedly taken underlie waterbodies or watercourses which were navigable in fact when Florida became a State on March 3, 1845, and, as such, are sovereignty lands.

* * * * *

COUNT I

(Lands are not sovereignty in character)

10. The Peace River was not "meandered" (which would have indicated navigability) nor otherwise designated as navigable, by the original government surveyors or those who prepared the original township plats at any point north of the dividing line between Townships 38 and 39.

11. The Peace River was not navigable in fact on March 3, 1845, at any point north of the dividing line between Townships 38 and 39. Township 31 is north of that line.

12. Inasmuch as there were no navigable waterbodies on the lands described in paragraph 2, above, on March 3, 1845, no part of the lands are sovereignty lands.

The eight remaining counts of the reply counterclaim involve, all parties agree, only state law questions.

For a case to arise under federal law, a right or immunity created by that law must be an essential element of the plaintiff's claim; the federal right or immunity that forms the basis of the claim must be such that the claim will be supported if the federal law is given one construction or effect and defeated if it is given another. Maxwell

v. First Nat'l Bank of Monroeville, 638 F.2d 32, 35 (5th Cir. 1981);⁵ In Re Carter, 618 F.2d 1093, 1100 (5th Cir. 1980), citing Gully v. First Nat'l Bank in Meridian, 299 U.S. 109, 112, 57 S.Ct. 96, 97, 81 L.Ed. 70 (1936). In order to determine whether the claim arises under the Constitution or laws of the United States, we look to the complaint unaided by anticipated defenses and with due regard to the real nature of the claim. Maxwell, 638 F.2d at 35; Gully, 299 U.S. at 113, 57 S.Ct. at 98. "A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit

5 The Eleventh Circuit has adopted as binding precedent decisions rendered by the former Court of Appeals for the Fifth Circuit before the close of business on September 30, 1981. Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) (en banc).

does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which the result depends. This is especially so of a suit involving rights to land acquired under a law of the United States." Heirs of Burat v. Bd. of Levee Comm'rs, 496 F.2d 1336, 1342 (5th Cir.), cert. denied, 419 U.S. 1049, 95 S.Ct. 625, 42 L.Ed.2d 644 (1974), quoting Shulthis v. McDougal, 225 U.S. 561, 569, 32 S.Ct. 704, 706, 56 L.Ed. 1205 (1912).

Acknowledging these precepts, the parties differently characterize Mobil's pleading. Pointing to the reply counterclaim's challenge to Florida's acquisition of title to the disputed lands as sovereignty lands, the Trustees and Coastal argue that Mobil's claim turns on a federal question, namely,

the navigability of the Peace River on March 3, 1845, the date Florida was admitted to the Union. If the Peace River was navigable at that date, title to the lands beneath the river passed from the United States to the State of Florida under the equal footing doctrine⁶ and were received by Florida as sovereign lands. The passing of title under the equal footing doctrine, the argument continues, is a federally created right which is governed by federal law; thus, the navigability of the Peace River on March 3, 1845, is a substantial federal

⁶ Under the equal footing doctrine, "the new States . . . have the same rights, sovereignty and jurisdiction . . . as the original States possess within their respective borders." Mumford v. Wardwell, 6 Wall. 423, 436, 18 L.Ed. 756 (1867). Pollard's Lessee v. Hagan, 3 How. 212, 11 L.Ed. 565 (1845), held that under the equal footing doctrine, new states, upon their admission to the Union, acquire title to the lands underlying navigable waters within their boundaries.

question supporting federal subject matter jurisdiction.

Mobil maintains that its reply counterclaim involves a mere title dispute between Florida land claimants, each of whom derives its claim from the State, so that Florida law, and not federal law, governs the controversy. While federal law may determine the navigability of waters for the limited purpose of ascertaining whether title to a riverbed passed from the United States to Florida when Florida became a state, once title has passed, as the parties agree has occurred here, Florida law governs any subsequent claim to the property.

In its denial of Mobil's motion to remand, the district court embraced the characterization advanced by the Trustees and Coastal:

The navigability of the waterbodies in issue in 1845 and the location of the ordinary

high water line of the water-bodies in 1845, if they were navigable, are issues to be determined by federal law. Additionally, in this case the determination of these federal questions is a condition precedent to a declaration of Mobil's rights of ownership with respect to the lands which it claims through various deeds and patents. Mobil correctly states that a determination of whether the property in question was transferred into private ownership is a state question, which must be determined in accordance with State law, necessarily involving the State test of navigability. However, Mobil ignores the essential and initial necessity for a determination of the federal questions raised by its declaratory action before the State questions may even be reached. . . .

Mobil's "counterclaim" can thus be seen to have brought this action within the original jurisdiction of this Court as an action "arising under" federal law. Mobil's declaratory claim seeks fundamentally to resolve whether the sovereignty claim of the Trustees and Coastal, upon which the conversion claim is based, is valid. A determination of the validity of the sovereignty claim depends on the navigability of the

rivers in issue at statehood,
a federal question.

(citations omitted).

Clearly enough, Mobil does not allege that the Peace River was not navigable in fact on March 3, 1845, and that the disputed property is therefore not sovereignty land. The appellees cite United States v. Oregon, 295 U.S. 1, 55 S.Ct. 610, 79 L.Ed. 1267 (1935), and United States v. Utah, 283 U.S. 64, 51 S.Ct. 438, 75 L.Ed. 844 (1931), for the proposition that the question whether a river is navigable so that the submerged lands pass to a state at statehood is a federal question supporting federal jurisdiction. Those cases were property contests between the United States and a state. We do not question that when the United States and a state dispute whether submerged land has passed to a state under the equal footing doctrine

or remains federal land, navigability is a federal question. In order to ascertain whether Mobil's claim, with due regard to its real nature, presents a substantial controversy respecting the validity, construction, or effect of federal law, however, we must identify the role which the asserted federal question plays in the present controversy.

The disputed property was deeded by the State of Florida to Mobil's predecessor in interest in 1862, and the state held title to the property at the time of the conveyance. Title had passed to the state by one of two means: either Florida acquired the lands under the equal footing doctrine at statehood on March 3, 1845, because the Peace River was then navigable, or Florida acquired the lands in 1850 under the Swamp and Overflow Lands Grant Act, 9 Stat. 520, now codified at 43 U.S.C. § 982 (1976). If the state

acquired the lands under the equal footing doctrine in 1845, they were received as sovereignty lands; otherwise, they were not. Florida law treats sovereignty lands differently than other lands: sovereignty lands, unlike other lands, are held by the state in public trust and are subject to certain restrictions on alienation.

The position of the Trustees and Coastal is that the Peace River was navigable on March 3, 1845, so that the state received the disputed lands as sovereignty lands and the 1862 deed did not, under Florida law, convey the property to Mobil's predecessor in interest. Mobil's position is that the Peace River was not navigable on March 3, 1845, so that the state received the disputed lands in 1850 as nonsovereignty lands, and the 1862 deed, under Florida law,

conveyed the property to Mobil's pre-decessor in interest.

The sole significance in this case of the navigability of the Peace River in 1845 is that the State of Florida elects to denominate lands acquired from the United States under the equal footing doctrine as sovereign lands and to restrict the alienability of those lands. The federal question relied on by the appellees is a mere criterion which Florida chooses to adopt as the determinant of a rule of state real property law. In 1862, before the state deeded the disputed property to Mobil's predecessor in interest, the state was at absolute liberty, so far as federal law was concerned, to treat the property as it wished. If the property was subject to restrictions on alienation, those restrictions were imposed by state law. That the state chose to look to the equal

footing origin of the lands as fixing forever their sovereign character is no predicate for federal jurisdiction.

Properly viewed, then, the question which is asserted to support the jurisdiction of the district court is incidental to Mobil's claim and not at its essence; nor does the fact that a determination of navigability may resolve the controversy alter our conclusion.

The whole foundation of the duty is [state] law, which at its sole will incorporate the other law as it might incorporate a document. The other law or document depends for its relevance and effect not on its own force but upon the law that took it up, so . . . the cause of action arises wholly from the law of the State. . . . The mere adoption by a State law of a United States law as a criterion or test, when the law of the United States has no force proprio vigore, does not cause a case under the State law to be also a case under the law of the United States. . . .

Smith v. Kansas City Title & Trust Co.,
255 U.S. 180, 214-15, 41 S.Ct. 243, 250,
65 L.Ed. 577 (1921) (Holmes, J.,
dissenting).

The decision of the Supreme Court in Oregon ex rel State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 97 S.Ct. 582, 50 L.Ed.2d 550 (1977), strongly supports our holding. There, the State of Oregon had brought a state court ejectment action against an Oregon corporation over the ownership of two portions of land underlying the navigable Willamette River. One portion had been within the riverbed since Oregon's admission to the Union, while the other had only later become part of the riverbed because of changes in the river's course. The Oregon courts took the view that federal common law controlled the dispute because the extent of a state's sovereign right under the equal footing doctrine

was a federal question. On this basis, they awarded the first portion to the state and the second to the corporation.

On certiorari, the Supreme Court vacated the judgment and remanded, holding that ownership of the disputed lands should be decided solely as a matter of Oregon law and not federal common law, because application of federal common law was required neither by the equal footing doctrine nor by any other principle of federal law. So holding, the Court overruled Bonelli Cattle Co. v. Arizona, 414 U.S. 313, 94 S.Ct. 517, 38 L.Ed.2d 526 (1973), and repudiated Bonelli's holding that the nature of the title conferred by the equal footing doctrine is governed by federal common law. 429 U.S. at 369-70, 97 S.Ct. at 586-587. "Although federal law may fix the initial boundary line between fast lands and the riverbeds at the time of

a State's admission to the Union, the State's title to the riverbed vests absolutely as of the time of its admission and is not subject to later defeasance by operation of any doctrine of federal common law." *Id.* at 370-371, 97 S.Ct. at 587. Most significantly here, the Court reaffirmed that:

[W]henever the question in any Court, state or federal, is, whether a title to land which had once been the property of the United States has passed, that question must be resolved by the laws of the United States; but . . . whenever, according to those laws, the title shall have passed, then that property, like all other property in the state, is subject to state legislation; so far as that legislation is consistent with the admission that the title passed and vested according to the laws of the United States.

Id. at 377, 97 S.Ct. at 590, quoting Wilcox v. Jackson, 13 Pet. 498, 517, 10 L.Ed. 264 (1839) (emphasis in original).

The Trustees and Coastal would limit Corvallis to title disputes in which the parties agree that the lands previously acquired by the state were acquired as sovereignty lands. The Supreme Court in Corvallis foreclosed this interpretation of its decision. The Court held that state law governs the disposition of property held by a state regardless of whether or not the state acquired the property as sovereignty land under the equal footing doctrine:

Thus, if the lands at issue did pass under the equal-footing doctrine, state title is not subject to defeasance and state law governs subsequent dispositions.

* * * * *

A similar result obtains in the case of riparian lands which did not pass under the equal footing doctrine. This Court has consistently held that state law governs issues relating to this property, like other real property, unless some other principle of federal law requires a different result.

429 U.S. at 378, 97 S.Ct. at 591.

The appellees insist that the pivotal issue in this case is indeed, as Corvallis requires, "whether a title to land which had once been the property of the United States has passed," because the principal controversy is whether the Trustees acquired title to the disputed lands in 1845 under the equal footing doctrine, or in 1850 as swamp and overflow lands. But there is no question in this case whether, in the sense obviously intended by Corvallis, title to the disputed land has passed; the parties agree that it has. The issue is whether, under Florida law, the 1862 deed to Mobil's predecessor conveyed the disputed property. That Florida chooses to answer this question by inquiring by what means it initially acquired title to the property does not alter the fact that this

is a case in which, title having passed to the state, state law controls.

A case bearing more directly on the collateral relationship between the navigability of the Peace River in 1845 and the present controversy is Miller's Executors v. Swann, 150 U.S. 132, 14 S.Ct. 52, 37 L.Ed. 1028 (1893). In Swann, Congress had granted public lands to the State of Alabama to aid in the construction of railroads. The Act granting the land provided explicit conditions governing any further conveyance by the State. The State conveyed the land to a railroad company, retaining a mortgage whose terms paralleled the conditions imposed by Congress. Upon the bankruptcy of the railroad, the State and a vendee of the railroad both claimed a certain parcel of land, disputing whether the railroad had sufficiently complied with the conditions of the Act of Congress

(as incorporated in the mortgage) to give it the power to convey to the third party claimant. The Alabama Supreme Court determined that the conditions had not been met, and that the State was entitled to the land. On appeal to the United States Supreme Court, the Court concluded that it was without jurisdiction to hear the matter for want of a federal question:

Now, whether [the Supreme Court of Alabama's] was a correct construction or not of the act [conveying the land to the railroad] and the reservation of the mortgage, is a purely local question, and involves nothing of a federal character. The question is not what rights passed to the state under the acts of congress, but what authority the railroad company had under the statute of the state. The construction of such a statute is a matter for the state court, and its determination thereof is binding on this court. The fact that the state statute and the mortgage refer to certain acts of congress as prescribing the rule and measure of the rights granted by the state does not make

the determination of such rights a federal question. A state may prescribe the procedure in the federal courts as the rule of practice in its own tribunals: it may authorize the disposal of its own lands in accordance with the provisions for the sale of the public lands of the United States; and in such cases an examination may be necessary of the acts of congress, the rules of the federal courts, and the practices of the land department, and yet the questions for decision would not be of a federal character. The inquiry along federal lines is only incidental to a determination of the local question of what the state has required and prescribed. The matter decided is one of state rule and practice. The facts by which that state rule and practice are determined may be of a federal origin.

Id. at 136-37, 14 S.Ct. at 54 (emphasis added).

We find nothing in the case law since Swann that causes us to question its currency, see, e.g., Moore v. Chesapeake & Ohio Ry. Co., 291 U.S. 205, 54 S.Ct. 402, 78 L.Ed. 755 (1934); Morris v. Danna, 411 F.Supp. 1300 (D. Minn.

1976), aff'd, 547 F.2d 436 (8th Cir. 1977), or its obvious applicability to this case.

Our conclusion that the district court has no jurisdiction of this case comports with the fact that there is no federal interest whatever in the resolution of this controversy. Federal law is appropriately indifferent to Florida's invocation or application of a federal test of navigability as a precondition to determining a question of state law. The appellees direct us to United States v. Holt State Bank, 270 U.S. 49, 55-56, 46 S.Ct. 197, 199, 70 L.Ed. 465 (1926), in which the Court held that "Navigability, when asserted as the basis of a right arising under the Constitution of the United States, is necessarily a question of federal law to be determined according to the general rule recognized and applied in the federal courts. . . .

To treat the question as turning on the varying local rules would give the Constitution a diversified operation where uniformity was intended." Here, not as in Holt State Bank, neither party asserts navigability as the basis of a right arising under the Constitution or laws of the United States. Moreover, no uniform interpretation of federal law is intended or needed when the federal law exerts no force proprio vigore but is merely set up by the state as a criterion by which to decide a state law question.

III.

We hold, then, that the district court lacks jurisdiction of this case. The judgment appealed in No. 81-5533 is vacated, and on receipt of the mandate the district court shall remand the case

to the state court. The injunction appealed in No. 81-5812 is dissolved.*

VACATED, with instructions.

6867-98.6

* We note that on October 15, 1981, the district court extended the injunction in this case to apply to American Cyanamid Company which is involved in a similar lawsuit against Coastal. American Cyanamid Company's appeal of that injunction is now pending before this court in Case No. 81-6061.

APPENDIX D

IN THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT
OF FLORIDA
TALLAHASSEE DIVISION

COASTAL PETROLEUM)
COMPANY, et al.,)
Plaintiffs,)
vs. TCA 77-0946)
INTERNATIONAL MINERALS)
& CHEMICAL CORPORATION,)
Defendant.)

COASTAL PETROLEUM)
COMPANY, et al.,)
Plaintiffs,)
vs. TCA 77-0971)
U.S.S. AGRI-)
CHEMICALS,)
Defendant.)

COASTAL PETROLEUM)
COMPANY, et al.,)
Plaintiffs,
vs.) TCA 77-0972

SWIFT AGRICULTURAL)
CHEMICALS)
CORPORATION,)

Defendant.)

COASTAL PETROLEUM)
COMPANY, et al.,)
Plaintiffs,
vs.) TCA 77-0973
AGRICO CHEMICAL)
COMPANY,)
Defendant.)

COASTAL PETROLEUM)
COMPANY, et al.,)
Plaintiffs,
vs.) TCA 77-0974
W. R. GRACE &)
COMPANY,)
Defendant.)

COASTAL PETROLEUM)
COMPANY, et al.,)
Plaintiffs,)
vs. TCA 77-0975)
AMERICAN CYNAMID)
CO.,)
Defendant.)

MEMORANDUM OPINION AND ORDER

The above-styled cases were brought by plaintiff Coastal Petroleum Company seeking damages for alleged conversion by the several defendants. The State of Florida has been joined as an involuntary plaintiff. Jurisdiction is present under 28 U.S.C. §1332 because of diversity of citizenship of the parties.

Coastal holds a lease from the State of Florida entitling it to the mineral, oil and gas rights in state sovereignty lands underlying the Myakka,

Manatee, Little Manatee, Alafia, Caloosa-hatchee, and Peace Rivers. Coastal and the State of Florida (the "plaintiffs") contend that the defendants have wrongfully conducted phosphate mining operations on state-owned sovereignty lands covered by the lease to Coastal and that the defendants are therefore liable for conversion. The defendants, in turn, claim ownership of the disputed water bottoms because the rivers flow through lands conveyed to the defendants' predecessors in title by deeds from the Internal Improvement Trust Fund of the State of Florida and patents from the federal government. Apparently, none of the conveyances from the state or the federal government contains any specific reference to submerged lands.

In the view of Coastal and the State of Florida, resolution of the issue of conversion will necessitate a

factual inquiry into the ownership of the lands mined by the defendants. The plaintiffs assert that if a parcel of land was submerged beneath a body of water that was navigable when Florida was admitted to the Union in 1845, then that land has remained state sovereignty land held in trust for the public and cannot have been validly deeded away. The defendants respond that as a consequence of the decisions in Odom v. Deltona Corp., 341 So.2d 977 (Fla. 1977), and Burns v. Coastal Petroleum Co., 194 So.2d 71 (Fla. 1967), the complex factual inquiry suggested by the plaintiffs is unnecessary.

By order dated September 15, 1978, this court directed the parties to brief the legal questions involved in Odom and Burns and their application to the present cases. These issues are

presently before the court for determination.

I. Odom v. Deltona Corp.

Odom involved a dispute between the Deltona Corporation and the State of Florida over ownership of certain small, non-meandered lakes of less than 140 acres apiece. Deltona claimed ownership because the lakes were wholly contained within the bounds of properties which Deltona owned "under various chains of title originating either in U.S. Patents or deeds of the Trustees [of the Internal Improvement Fund] of land acquired by the state under the Swamp and Overflow Lands Grant Act of September 28, [1850]." No reservations of the lakes to public use or ownership were contained in the grants. The State contended the lake beds were under navigable waters and therefore were held by the

state in trust for the public. The Supreme Court of Florida affirmed the trial court's ruling that the lands in question were owned by Deltona, not the state.

Defendants contend that "under the several doctrines announced and reaffirmed in Odom v. Deltona," consideration of whether the lands contested here were sovereign in character in 1845 is irrelevant. These "doctrines" are (1) certain constitutional and statutory presumptions described in the trial court's opinion; (2) legal estoppel; and (3) equitable estoppel. Defendants expressly disavow any reliance at the present time on a fourth ground for decision in Odom--the Florida Marketable Record Title Act, Florida Statutes §712.01, et seq.

A. Constitutional and Statutory Presumptions

The trial court in Odom discussed at length the provisions of Article X, §11 of the Florida Constitution and Florida Statutes §§197.228, 253.12(1), and 253.151.¹ All of these enactments deal in some way with navigable waters or sovereignty lands; excepted from their scope are all lands previously alienated or conveyed into private ownership. Defendants here contend that the Florida Constitution and the statutes discussed in Odom recognize that once a conveyance of land by deed has been made, the State of Florida no longer has a claim to that land on the basis of its sovereignty status. Thus, the argument goes, the lands at issue in the present cases have been alienated into private ownership,

¹ As the plaintiffs point out, Florida Statutes §§197.228(2) and 253.151 have no application whatsoever to the issues in the present litigation, because they do not deal with rivers.

as is shown by the deeds and patents to defendants' predecessors in title.

As the trial court in Odom noted, the constitutional and statutory provisions relied upon by defendants "are not legislative conveyances of trust properties." 341 So.2d at 984. They merely recognize that any submerged lands that have been validly conveyed into private ownership are not still to be considered sovereignty lands. Id. None of them provides a clue as to which submerged lands in the state have been conveyed, and before they can come into play in the present litigation, it first would have to be demonstrated that the contested properties have in fact been deeded away by state or federal authorities.

Although the deeds and patents of record indicate that the uplands surrounding the rivers involved here were

conveyed to defendants' predecessors in interest, the so-called "public trust doctrine" precludes the assumption that the rivers also thereby passed into private ownership. The public trust doctrine derives from the common law of England, which held that the Crown, as sovereign, retained title to the beds of all navigable waters in trust for the benefit of the public. Shively v. Bowlby, 152 U.S. 1 (1894); Broward v. Mabry, 50 So. 826 (Fla. 1909); Martin v. Busch, 112 So. 274 (Fla. 1927). The chief purpose of the public trust doctrine is to ensure that navigable waters and the lands beneath them will not be sold or otherwise allowed to pass into private ownership, thereby depriving the public of their use for navigation, fishing and other common purposes. Shively v. Bowlby, supra; State v. Black River Phosphate Co., 13 So. 640 (Fla. 1893). All lands

beneath navigable waters which are held in trust are known as "sovereignty lands."

See Martin v. Busch, supra.

Application of the doctrine mandates that state sovereignty lands "cannot be wholly alienated." State ex rel Ellis v. Gerbing, 47 So. 353, 356 (Fla. 1908). The Florida courts have recognized, however, that, where the public interest would be served, certain conveyances of sovereign land can be made. As expressed by the Florida Supreme Court early in this century:

A state may make limited disposition of portions of [sovereign] lands, or of the use thereof, in the interest of the public welfare, where the rights of the whole people of the state as to navigation and other uses of the waters are not materially impaired. The states cannot abdicate general control over such lands and the waters thereon, since such abdication would be inconsistent with the implied legal duty of the states to preserve and control such lands and the waters thereon and the

use of them for the public good.

State ex rel. Ellis v. Gerbing, supra,
at 355. See also Trustees of Internal
Improvement Fund v. Claughton, 86 So.2d
775, 786 (Fla. 1956).

The basic principles of the public trust doctrine are now incorporated into the Florida Constitution:

The title to lands under navigable waters, within the boundaries of the state, which have not been alienated, . . . is held by the state, by virtue of its sovereignty, in trust for all the people. Sale of such lands may be authorized by law, but only when in the public interest. Private use of portions of such lands may be authorized by law, but only when not contrary to the public interest.

Florida Constitution, Art. 10, §11.

Concomitant to the public trust doctrine is the rule of strict construction of governmental land grants and deeds. "[A] grant in derogation of sovereignty must be strictly construed in

favor of the sovereign." Trustees of Internal Improvement Fund v. Claughton, supra, at 786. See also State v. Black River Phosphate Co., 13 So. 640, 650 (Fla. 1893). The right of a private party to ownership of lands below the high water mark "would be such an unusual and extraordinary one that it should be particularly shown and claimed when sought to be made available in a suit." Williams v. Guthrie, 137 So. 682, 685 (Fla. 1931); Brickell v. Trammell, 82 So. 221, 227-28 (Fla. 1919); Martin v. Busch, supra, at 284.

Additionally, a conveyance by the sovereign of uplands does not include a conveyance of lands below the line of ordinary high water unless both the authority and the intent to convey such lands is clear. Shively v. Bowlby, supra; Martin v. Busch, supra. Thus, a grantee of state-owned lands takes with notice

that the conveyance extends only to the high water mark and does not include sovereignty lands. Odom v. Deltona Corp., supra, at 988; Martin v. Busch, supra, at 285-86.

As noted previously, the determination of the sovereign or non-sovereign character of any parcel of land depends upon whether it lies under navigable waters. The issue of navigability is essentially a factual matter; as the Florida Supreme Court explained in Odom v. Deltona, supra, "[n]avigability at law is generally a question of navigability in fact." 341 So.2d at 988. See also Bucki v. Cone, 6 So. 160, 161 (Fla. 1889). While there are several standards of navigability, Florida has adopted what is known as the "federal title test," Odom v. Deltona, supra, at 988, which holds "that whether a river is navigable in fact is to be determined by inquiring

whether it is used, or is susceptible of being used, in its natural and ordinary condition as a highway for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." Baker v. State, 87 So.2d 497, 498 (Fla. 1956).

Determination of whether a body of water was meandered is helpful in deciding the issue of navigability. "In Florida, meandering is evidence of navigability which creates a rebuttable presumption thereof. The logical converse of this proposition . . . is that non-meandered lakes and ponds are rebuttably presumed non-navigable." Odom, supra, at 988-99.

The foregoing discussion reveals why the constitutional and statutory provisions applied in Odom do not foreclose the claims made here by Coastal and the State of Florida. Unlike the

lakes and ponds in Odom, the rivers involved in the present cases have not been determined to be non-navigable. Thus, defendants' title to the neighboring uplands does not in itself give them any claim to lands lying below the ordinary high water mark; title to all sovereignty land is impliedly reserved to the state, and the grantee of uplands takes with notice that the conveyance does not pass title to trust properties.²

Martin v. Busch, supra. Thus, the factual

2 The concept of notice of navigability was not utilized in Odom because the lakes involved there were so small as not to put the owner of neighboring uplands on notice that they might be navigable. Indeed, such lakes would not commonly be used as "highway[s] for commerce," Baker v. State, supra, at 498, since it would in all probability be easier to go around them than to go across them. Rivers, on the other hand, often extend long distances and are far more likely to be used for commercial purposes, because if they are sufficiently broad and deep they provide natural conduits for trade and transportation.

question of navigability remains. Although all parties appear in agreement that the disputed rivers were meandered only for relatively short distances near the Gulf of Mexico, this circumstance gives rise only to a rebuttable presumption of non-navigability. Odom, supra. Plaintiff and the State of Florida are entitled to present evidence, as they say they are prepared to do, showing that the presumption is unwarranted and that the rivers are navigable-in-fact.

The doctrine of legal estoppel, or estoppel by deed, is also unavailing to defendants. This doctrine is defined in Florida in the following manner:

Legal estoppel or estoppel by deed is defined as a bar which precludes a party to a deed and his privies from asserting as against others and their privies any right of title in derogation of the deed, or from denying the truth of any material fact asserted therein. In other

words, legal estoppel contemplates that if I execute a deed purporting to convey an estate or land which I do not own or one that is larger than I own and I later acquire such estate or land, then the subsequently acquired land or estate will by estoppel pass to my grantee.

Legal estoppel or estoppel by deed is determined by the intention of the parties as expressed in the deed. Whether or not legal estoppel may be applied in a given case is dependent entirely on the language used in the deed or which appears on the face of the instrument.

Trustees of Internal Improvement Fund v. Lobeau, 127 So.2d 98, 102 (Fla. 1961). Estoppel may be applied against the state or its subdivisions where necessary to prevent "manifest injustice" to private persons. Lobeau, at 102; Trustees of Internal Improvement Fund v. Claughton, 86 So.2d 775 (Fla. 1956).

Lobeau involved a Murphy Act conveyance by the Trustees of submerged tidal land in 1946. In 1956 the Trustees

proposed to sell the property already conveyed to Lobean. Suit was filed to enjoin the Trustees from selling the land, and the Trustees answered by alleging the deed to Lobean was invalid because the property was sovereignty land, the title to which remained vested in the Trustees. The Florida Supreme Court held the state was legally estopped to deny the validity of its conveyance to Lobean. Significantly, the court noted that the sovereignty lands covered by the deed were lands which the Trustees were statutorily authorized to sell. 127 So.2d at 103.

Legal estoppel was also applied in Odom, the court stating, "If the state has conveyed property rights which it now needs, these can be reacquired through eminent domain; otherwise, legal estoppel is applicable and bars the Trustees' claim of ownership, subject to rights

specifically reserved in such conveyances." 341 So.2d at 989. Crucial to the application of legal estoppel in Odom was the fact that the lakes in question were non-navigable and that the underlying lands thus were not sovereign in character. Consequently, there was no question of the authority of the Trustees to convey them into private ownership, the court more than once speaking of "valid federal and state grants of title" and "lawfully executed land conveyances." 341 So.2d at 989. (emphasis supplied.)

The existence of lawful authority to convey plainly distinguishes Lobean and Odom from the instant cases. Unlike Odom, it has not yet been determined whether the lands in dispute are non-sovereign and therefore indisputably capable of conveyance to private parties. If sovereign, it is evident that the

Trustees were wholly without authority to alienate them until 1969, a date subsequent to the conveyances to defendants' predecessors in interest.³ The state may not be estopped by the unauthorized acts of its officers. Dade County v. Bengis Associates, Inc., 257 So.2d 291 (Fla. 3d D.C.A. 1972); Greenhut Construction Co. v. Henry A. Knott, Inc., 247 So.2d 517 (Fla. 1st D.C.A. 1971).

There is another, perhaps even more compelling reason why the Trustees' deeds cannot work an estoppel against the State of Florida. The deeds contain no indication that the state intended to convey title to sovereign lands. Estoppel by deed, as indicated in Lobean, "is determined by intention of the parties

³ See Florida laws Ch. 69-308 (1969), which for the first time vested the title to navigable fresh water lakes, rivers and streams in the Trustees of the Internal Improvement Trust Fund.

as expressed in the deed." 127 So.2d at 102. Here, the deeds are silent as to whether a conveyance of sovereign title is intended. It is clear, however, that under the public trust doctrine the intent to alienate trust property must be clearly stated. Martin v. Busch, supra. Consequently, the lack of any reference to submerged lands in the deeds from the state to defendants' predecessors in interest negates any possible inference that these lands were meant to be conveyed. Estoppel by deed is therefore inapplicable.

C. Equitable Estoppel

The question of equitable estoppel requires little discussion at present. Like legal estoppel, equitable estoppel may be applied against the state. Lobean, supra. According to Lobean,

Equitable estoppel as applied to land titles is a different thing [from estoppel by deed]. It depends on the conduct of the parties for its efficacy. It is not conversed with the language of the instrument and may actually deny the legal effect of the deed. In Florida Land Investment Co. v. Williams, 1928, 98 Fla. 1258, 116 So. 642, 643, this court said:

"An equitable estoppel, as affecting land titles, is a doctrine by which a party is prevented from setting up his legal title because he has through his acts, words or silence led another to take a position in which the assertion of the legal title would be contrary to equity and good conscience."

117 So.2d at 102.

Since inquiry into the actions of acquiescence of the party sought to be estopped is essential to its application, equitable estoppel cannot be imposed as a matter of law. Whether a party is estopped depends upon the facts and circumstances of the particular case. Terrell v. Weymouth, 13 So. 429 (Fla. 1893).

Accordingly, a ruling as to the applicability of equitable estoppel is inappropriate at present and must be deferred until such time as a full factual record can be presented.

II. Burns v. Coastal Petroleum Co.

The defendants contend that the decision of the Florida First District Court of Appeal in Burns v. Coastal Petroleum Co., 194 So.2d 549 (Fla. 1967), cert. denied, 201 So.2d 549 (Fla. 1967), cert. denied, 389 U.S. 913 (1967), bars Coastal and the State of Florida from claiming a lengthy portion of the Peace River as sovereign land. Burns involved a dispute between Coastal and the Florida Trustees of the Internal Improvement Fund over whether the water bottom of Lake Hancock in central Florida fell within the terms of Drilling Lease No. 224-B as modified, the same lease from the

Trustees to Coastal which forms the basis for Coastal's claim here. The issue was solely one of construction of the lease instrument. The court concluded that, since Lake Hancock was not one of the bodies of water specifically named in the lease, the submerged lands covered by the lease did not include those lying beneath Lake Hancock.

The following passage appears in the Burns opinion:

It is admitted that Lake Hancock is not mentioned in any of the lease documents but is a sovereign body of navigable water meandered by the government and within the jurisdiction of the Trustees. It is also admitted that Lake Hancock is the headwater of Peace River and flows through natural channels into the Gulf of Mexico. Lake Hancock does not flow directly into Cohanzy Creek which flows into Peach Creek which empties into Peace River. The southern portion of Peace River, from its mouth northward to the line between Townships 38/39, is meandered and within the jurisdiction of the Trustees. However, Peace

River north of Township 38/39
is not meandered and does not
belong to the State. That
is, Peace River for a distance
of 40 miles south of Lake Han-
cock is in private ownership.
(emphasis supplied)

194 So.2d at 74. Defendants claim that since both plaintiff and the State of Florida were parties to Burns, they should be bound by the determination that the Peace River north of the line between Townships 38 and 39 is privately owned and collaterally estopped to re-litigate this question.

In a diversity action state law governs the applicability of the doctrine or collateral estoppel. See Breeland v. Security Insurance Co., 421 F.2d 918 (5th Cir. 1969); Annotation, State or Federal Law as Governing Applicability of Doctrine of Res Judicata or Collateral Estoppel in Federal Court Action, 19 ALR Fed. 709, § 3(a), and cases cited therein. The general rules relating

to collateral estoppel in Florida are set out in Mobile Oil Corp. v. Shevin, 354 So.2d 372 (Fla. 1977):

Collateral estoppel, or estoppel by judgment, is a judicial doctrine which in general terms prevents identical parties from relitigating issues that have previously been decided between them. The essential elements of the doctrine are that the parties and issues be identical, and that the particular matter be fully litigated and determined in a contest which results in a final decision of a court of competent jurisdiction.

354 So.2d at 374.

For at least two reasons collateral estoppel cannot be applied in this case. First, the parties are not identical to those in Burns. Although both Coastal and State of Florida were parties to Burns, the defendants were not.

Second, it is clear that the question of state ownership of the Peace River north of Townships 38/39 was not

an issue in Burns and thus was not "fully litigated and determined." As noted above, the only question on appeal was whether Lake Hancock was included within the terms of Coastal's mineral lease. Neither navigability nor sovereign ownership of the river was directly presented as an issue. The statement of the court concerning private ownership of a portion of the river was mere dicta, since it was not necessary to the question of construction of the lease.⁴ State ex rel. Biscayne Kennel Club v. Board of Business Regulation, 276 So.2d 823, 826 (Fla. 1973).

ORDER

It is ORDERED AND ADJUDGED:

⁴ Additionally, it is now obvious, after Odom, that the Burns court's conclusion was erroneous as a matter of law. A lack of meandering creates a rebuttable, not a conclusive, presumption of non-navigability.

1. The rulings made above concerning Odom v. Deltona Corp., 341 So.2d 977 (Fla. 1977), and Burns v. Coastal Petroleum Co., 194 So.2d 71 (Fla. 1st D.C.A. 1967), shall govern the further course of this litigation.

2. On or before February 1, 1979, counsel for all parties shall submit proposed agenda for the conduct of further discovery in these cases.

DONE AND ORDERED this 10th day of January, 1979.

/s/ William Stafford
WILLIAM STAFFORD
UNITED STATES DISTRICT JUDGE

103-1

APPENDIX E
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 81-6083, 81-6094,
81-6153 and 81-6154.

COASTAL PETROLEUM COMPANY, a Florida Corporation, and The United States Army Corps of Engineers, The State of Florida Department of Natural Resources and The Board of Trustees of the Internal Improvement Trust Fund of the State of Florida,)

Plaintiffs-Appellees,)

v.)

U.S.S. AGRI-CHEMICALS, A DIVISION OF UNITED STATES STEEL CORPORATION, a Delaware Corporation authorized to do business in Florida,)

Defendant-Appellant,)

COASTAL PETROLEUM COMPANY and The State of Florida Department of Natural Resources and The Board of Trustees of the Internal Improvement Trust Fund of the State of Florida,)

Plaintiffs-Appellees,)

v.)
INTERNATIONAL MINERALS)
& CHEMICAL CORPORATION,)
Defendant-Appellant,)
COASTAL PETROLEUM COM-)
PANY, a Florida Corpora-)
tion,)
Plaintiff-Appellee,)
The State of Florida,)
Department of Natural)
Resources, etc., et al.,)
Involuntary)
Plaintiffs-Appellees,)
v.)
W.R. GRACE & COMPANY,)
a Florida Corporation,)
Defendant-Appellant.)
COASTAL PETROLEUM COM-)
PANY, a Florida Corpora-)
tion,)
Plaintiff-Appellee,)
The State of Florida)
Department of Natural)
Resources,)
Involuntary)
Plaintiffs,)
v.)

SWIFT AGRICULTURAL)
CHEMICALS CORP.,)
a Delaware corporation,)
authorized to do busi-)
ness in Florida, now)
Estech General Chemicals
Corporation,)

Defendant-Appellant.)

Appeals from the United States District
Court for the Northern District of
Florida

Jan. 17, 1983

Before HILL and HENDERSON, Circuit
Judges, and GARZA, Senior Circuit Judge:

JAMES C. HILL, Circuit Judge:

I.

This is a consolidated appeal
of four cases. Defendants are appealing
the propriety of an injunction issued by
the district court, and that court's
conclusion that subject matter jurisdic-
tion existed. For the reasons stated
below we reverse.

HISTORY

The basis of this case is a title dispute involving a complex procedural history which we will only briefly summarize. In 1976, Mobil Oil Corporation [hereinafter Mobil] filed suit in a Florida State Court seeking a declaration of its rights under an oil exploration agreement it had with Coastal Petroleum Company [hereinafter Coastal]. Coastal filed several counterclaims including one alleging Mobil's conversion of phosphate ore from certain rivers in Florida. Coastal, was joined in its counterclaim, by the Board of Trustees of the Internal Improvement Trust Fund of the State of Florida and the Department of Natural Resources¹ [hereinafter collectively

1 The Board of Trustees was merged into the Department of Natural Resources in 1975 by Florida Statute, chapter 75-22. Since then the legislature has made

referred to as Trustees].

Mobil filed a reply counterclaim seeking a declaration of the parties' rights based upon an 1862 deed granted by the Trustees to Mobil's predecessor in interest which raised the issue of the navigability of certain waters in Florida that were in dispute. Based upon Mobil's counterclaim, Coastal and the Trustees removed the action to federal court asserting federal question jurisdiction. Coastal's and the Trustees' allegation of federal question jurisdiction is based upon the contention that Mobil's reply counterclaim raised the issue of whether the Peace River was a navigable body of

it clear that the Trustees are still a viable independent agency, holding title to certain lands and having the authority to control those lands. Laws of Florida Ch. 79-255 § 1 (1979). It is clear from the legislative history that the merger took nothing away from this agency and was undoubtedly effectuated for administrative convenience.

water. Their position derives from the State's acquisition of Peace River and the lands beneath it back in 1845 when Florida was admitted to the Union. If, at the time of the statehood, the Peace River was navigable, then the lands passed from the United States to Florida as sovereign lands under the equal footing doctrine.² If the state received these lands as sovereign lands, then, according to Coastal and the Trustees, the 1862 deed leasing these lands to Mobil's predecessors in interest was invalid. Whether the Peace River was navigable on the

² The equal footing doctrine states: "the new States . . . have the same rights, sovereignty and jurisdiction . . . as the original States possess within their respective borders." Mumford v. Wardwell, 6 Wall. (73 U.S.) 423, 18 L.Ed. 756 (1867). According to Pollard's Lessee v. Hagan, 3 How. (44 U.S.), 212, 11 L.Ed. 565 (1845), under the equal footing doctrine, upon admission to the Union, new States acquire title to the lands underlying navigable waters within their boundaries.

date Florida was admitted to the union, according to Coastal and the Trustees, presents a substantial federal question. The appellees argue that the passing of title is a federally created right which should be governed by federal law.

Mobil, however, contends that the Peace River was not navigable at the time of statehood, and therefore, the lands did not pass to Florida as sovereignty lands. Mobil suggests that Florida received the lands in 1850 under the Swamp and Overflow Lands Grant Act, 9 Stat. 520, codified at 43 U.S.C. § 982 (1976). Accordingly, Mobil maintains that its reply counterclaim does not raise the issue of the navigability of the Peace River, but rather a typical title dispute between Florida land claimants, each of whom derived its claim from the State. Because this is only a title dispute concerning Florida law,

there should be no federal question jurisdiction.

Prior to any determination by the district court as to the viability of Coastal's and the Trustees' claim of federal question jurisdiction, Coastal filed suits, similar to its conversion suit against Mobil, against five other mining companies four of which were based on both federal question³ and diversity of citizenship⁴ jurisdiction. The five

³ 28 U.S.C. § 1331(a) (1976) provides:

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

⁴ 28 U.S.C. § 1332(a) (1976) provides in pertinent part:

The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and is between--(1) citizens of different states. . . .

mining companies were: American Cyanamid Company, USS Agri-Chemicals, Estech General Chemical Corporation, International Minerals and Chemical Corporation and W.R. Grace and Company.

Coastal's new contention of diversity of citizenship was based on its belief that the Trustees, although an agency of the State, were sufficiently independent from the state as to qualify them as a citizen. If the Trustees are a citizen of the state of Florida, then complete diversity exists entitling them to subject matter jurisdiction in the federal court. Subsequent to Coastal's initiation of the suits in federal court, four of the six mining companies initiated quit title actions in the Florida state court system. Coastal then sought and obtained an injunction issued from the district court which extended to all six mining companies, enjoining all part-

ies from instituting any lawsuit, in state or federal court, involving any of the issues to be considered in the conversion suits. Mobil and American Cyanamid Company appealed the issuing of the injunction to the Eleventh Circuit and both companies have succeeded in dissolving the injunction as it pertains to them.⁵

The remaining four defendants are challenging the propriety of the same injunction issued by the district court and are appealing that court's conclusion of the existence of subject matter jurisdiction.

FEDERAL QUESTION JURISDICTION

The district court's order

⁵ Mobil Oil Corp. v. Coastal Petroleum, 671 F.2d 419 (11th Cir.), cert. denied, ___ U.S. ___, 103 S.Ct. 300, 74 L.Ed.2d 281 (1982); Coastal Petroleum v. American Cyanamid Co., 673 F.2d 1343 (11th Cir. 1982).

concluding that federal question jurisdiction existed was issued prior to this court's opinion in Mobil Oil Corporation v. Coastal Petroleum Company, 671 F.2d 419 (11th Cir. 1982). In Mobil, where the identical title disputes were raised, this court concluded that the "question of title to land which depended upon whether state land was subject to restrictions on alienation did not present a federal question merely because the issue of whether the river was navigable was involved. . . ." Id. at 424.

Because we have concluded that federal question jurisdiction did not exist in Mobil, we also conclude that there is no federal question presented as against the remaining four mining companies. Although Coastal attempts to assert other reasons upon which federal question jurisdiction exists, we find the arguments without merit.

DIVERSITY JURISDICTION

For purposes of diversity jurisdiction a state is not a citizen of any state. Postal Telegraph Cable Co. v. Alabama, 155 U.S. 482, 15 S.Ct. 192, 39 L.Ed. 231 (1894); see C. Wright, A. Miller and E. Cooper, Federal Practice and Procedure: Jurisdiction § 3602 n.13 (1975). Whether the Trustees are considered a "State" for purposes of diversity, or whether they qualify as a separate and independent agency is the threshold question. If the Trustees are considered part of the State so that they are not a "citizen" within the meaning of § 1332, then complete diversity would not exist. See Strawbridge v. Curtis, 7 U.S. (3 Cranch) 267, L.Ed. 435 (1806).

This court, in Aerojet-General Corporation v. Askew, 453 F.2d 819 (5th Cir. 1971), resolved the question of

whether the Trustees qualify as being sufficiently independent to be considered a "citizen" for purposes of diversity jurisdiction. In Aerojet, suit for specific performance was brought against the Trustees and the Florida State Board of Education. The court, after examining Florida law, and in determining whether the Board could rely on the eleventh amendment state immunity doctrine, concluded that "this suit does not constitute an action against the State of Florida and is, therefore, not barred by the eleventh amendment to the United State Constitution, as to either of the two state boards in question." Id. at 830, see Farrugia v. Askew, 371 F.Supp. 736 (N.D. Florida 1973). Although the determination made by the court in Aerojet concerned eleventh amendment immunity, we conclude that the analysis for determining the Board's status as a "citizen"

for the purposes of diversity is the same. The court in Aerojet relied heavily on the fact that the appropriate Florida statutes had vested title to the land in question with the Trustees. Similarly, in the instant case, title of the land in dispute has been vested with the Trustees.⁶

The district court used a multi-factor analysis in holding that the Trustees are sufficiently separate and independent from the state so as to confer "citizen" status upon them. These factors have been approved by this circuit and are as follows: (1) whether the agency can be sued in its own name; (2) whether the agency can implead and be impleaded

6 Florida Stat. § 253.12(1) states: "Except submerged lands heretofore conveyed by deed or statute, the title to all sovereignty tidal and submerged bottom lands . . . and all submerged lands owned by the state . . . is vested in the Board of Trustees of the Internal Improvement Fund."

in any competent court; (3) whether the agency can contract in its own name; (4) whether the agency can acquire, hold title to, and dispose of property in its own name; and (5) whether the agency can be considered a "body corporate" having the rights, powers and immunities incident to corporations. See C.H. Leavall and Co. v. Board of Commissions of Port of New Orleans, 424 F.2d 764 (5th Cir. 1970); Central Stikstof Verkoopkantoor, N.V. v. Alabama State Docks Department, 415 F.2d 452 (5th Cir. 1969). Because the state has vested title of the land in the Trustees and because the Trustees have acted and continue to act as a separate and distinct entity from the state, we hold that the trustees are a citizen within the meaning of diversity jurisdiction under 28 U.S.C. § 1332 (1976).

THE INJUNCTION

Having established that jurisdiction exists, we turn to the merits of this case, the issuance of an injunction. Under the anti-injunction statute: "A court of the United States may not grant an injunction to stay proceedings in a state court except as expressly authorized by an Act of Congress, or where necessary in aid of its jurisdictions, or to protect to effectuate its judgments." 28 U.S.C. § 2283 (1976). The district in granting the injunction stated:

At this stage of the litigation . . . it would be imprudent to have the same issues litigated in state courts; the issue should be tried one time by one court in order to save both time and expense and avoid duplicitous litigation. No party should be allowed to circumvent this court's rulings by filing quiet title actions in state court. The court determines that an injunction is necessary in aid of its

jurisdiction.

The anti-injunction statute has been interpreted very narrowly by the Supreme Court.⁷ According to the Fifth Circuit, the phrase "where necessary in aid of its jurisdiction" "should be interpreted narrowly, in the direction of federal non-interference with orderly state proceedings." T. Smith & Sons, Inc. v. Williams, 275 F.2d 397, 407 (5th Cir. 1960). This court has clearly stated that an "action may be proved simultaneously in state and federal court and the federal court cannot enjoin the state even if the federal suit was filed first." Carter v. Ogden Corp., 524 F.2d 74, 76 (5th Cir. 1975).

The district court, in issuing

⁷ See Mitchum v. Foster, 407 U.S. 225, 92 S.Ct. 2151, 32 L.Ed.2d (1972); Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Engineers, 398 U.S. 281, 90 S.Ct. 1739, 26 L.Ed.2d 234 (1970).

the injunction had concluded that federal question jurisdiction existed. Based upon this conclusion, the court desired not to have the same issues litigated both in state and federal court particularly when there was a substantial federal question being raised. We have not concluded that there is no federal question. This case now comes into the federal court based solely upon diversity of citizenship. We, therefore, reverse the district court's issuing of the injunction.

The issues now remaining in the Coastal suit involve questions dependent entirely upon state law. Under the Erie doctrine, when a federal court is adjudicating rights created by the state, based solely on diversity of citizenship, the federal court, in effect, becomes just another state court for the purposes of determining the outcome of

the case.⁸ Accordingly, the district court, in this instance, would now be compelled to apply state law in the same manner as the state court. Therefore, there is no longer any compelling need for federal jurisdiction and no compelling need for the court to issue an injunction to protect its jurisdiction. Whether the injunction would have been proper assuming federal question jurisdiction existed is not an issue presently before this court and therefore, we do not reach the merits of this question.

Coastal and the trustees contend that the district court also issued the injunction to effect or protect its judgment. The appellees argue that there was a final judgment in this case in need of protection. Their contention

⁸ See Guaranty Trust Co. v. York, 326 U.S. 99, 108, 65 S.Ct. 1464, 1469, 89 L.Ed. 2079 (1944); see also C. Wright, Federal Courts § 55 256 (3d ed. 1976).

is based on the district court's order of January 10, 1979. This order resulted from the appellant's request that an early ruling on special legal issues be granted by the court. Appellants put forth several defenses which they asserted would resolve many of the issues, citing Odom v. Deltona Corp., 341 So.2d 977 (Fla. 1977) as precedent. The court reviewed the briefs submitted by all parties and concluded that several of the defenses raised by the appellants were without merit. The court ordered its ruling pertaining to these defenses to govern the rest of the litigation.

This order is simply a non-appealable interlocutory order. To fit into the "protect and effectuate judgment" exception, the order must be a final judgment. See International Association of Mechanics and Aerospace Workers v. Nix, 512 F.2d 125, 129-33 (5th Cir. 1975).

The word "judgment" is defined as "any order from which an appeal lies." Federal Rule Civil Procedure 54. According to Southern Methodist University Association v. Wynne and Jaffe, 599 F.2d 707 (5th Cir. 1979),

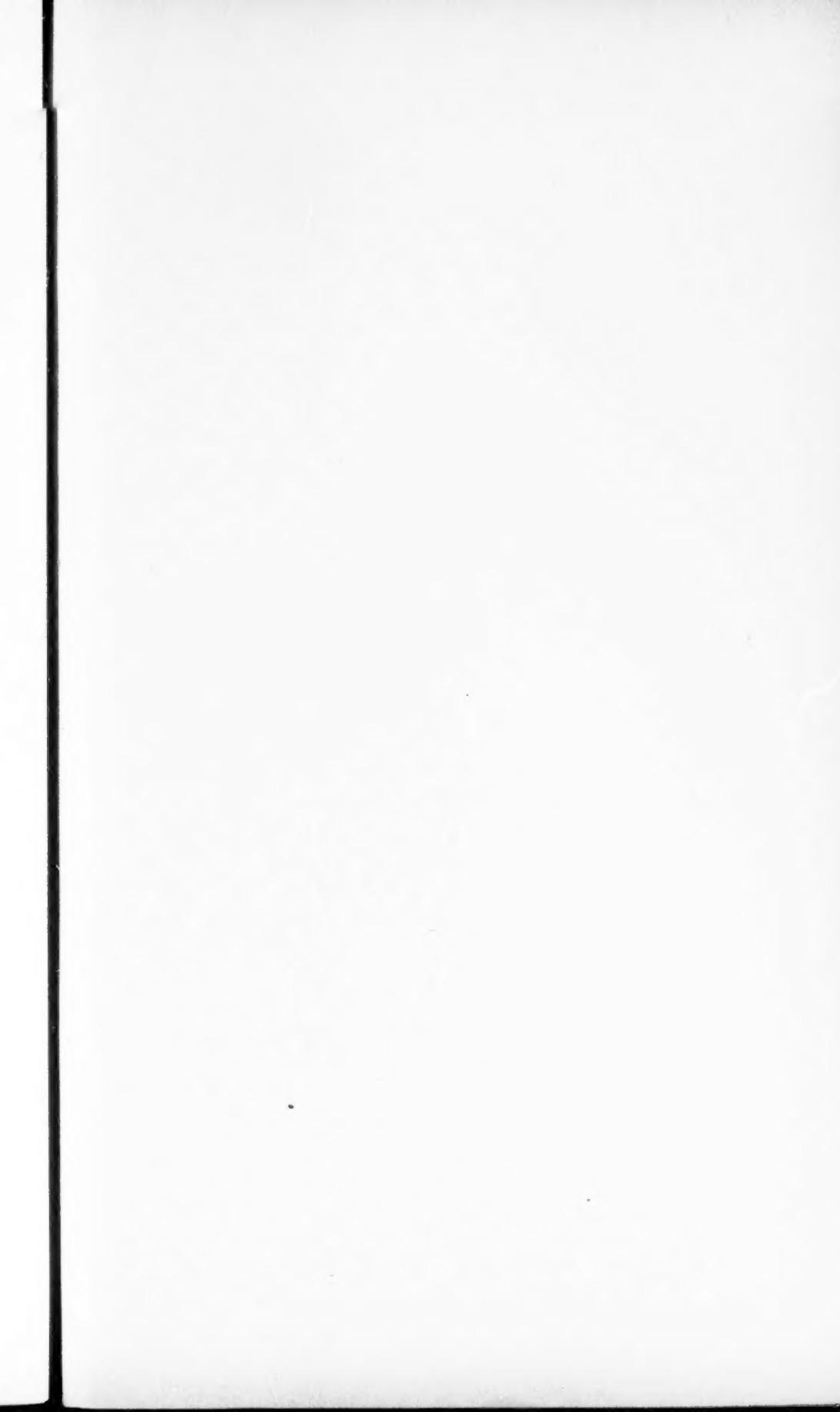
28 U.S.C. § 1291 empowers the courts of appeal to hear "appeals from all final decisions of the district courts." Generally, this means "all decision by the District Court that 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" Southern Methodist, 599 F.2d at 711 citing Coopers and Lybrand v. Livesay, 437 U.S. 463, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978), quoting Catlin v. United States, 324 U.S. 229, 233, 65 S.Ct. 631, 633, 89 L.Ed. 911 (1945).

An early order given prior to trial, eliminating certain defenses, does not constitute a final judgment within the meaning of § 2283. This order has not eliminated the need for a trial on the merits nor has it resolved many of the remaining factual and legal ques-

tions.

Because we find that the issuing of the injunction does not fall within any of the recognized exceptions to the Anti-Injunction statute, we conclude the district court abused its discretion and we reverse, dissolving the injunction.

REVERSED.



JAN 15 1987

JOSEPH F. SPANIOLO, JR.
Clerk

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

MOBIL OIL CORPORATION,
v. *Petitioner,*

BOARD OF TRUSTEES OF THE INTERNAL
IMPROVEMENT TRUST FUND OF THE
STATE OF FLORIDA,

Respondent.

On Writ of Certiorari to the Supreme Court of Florida

PETITIONER'S REPLY BRIEF

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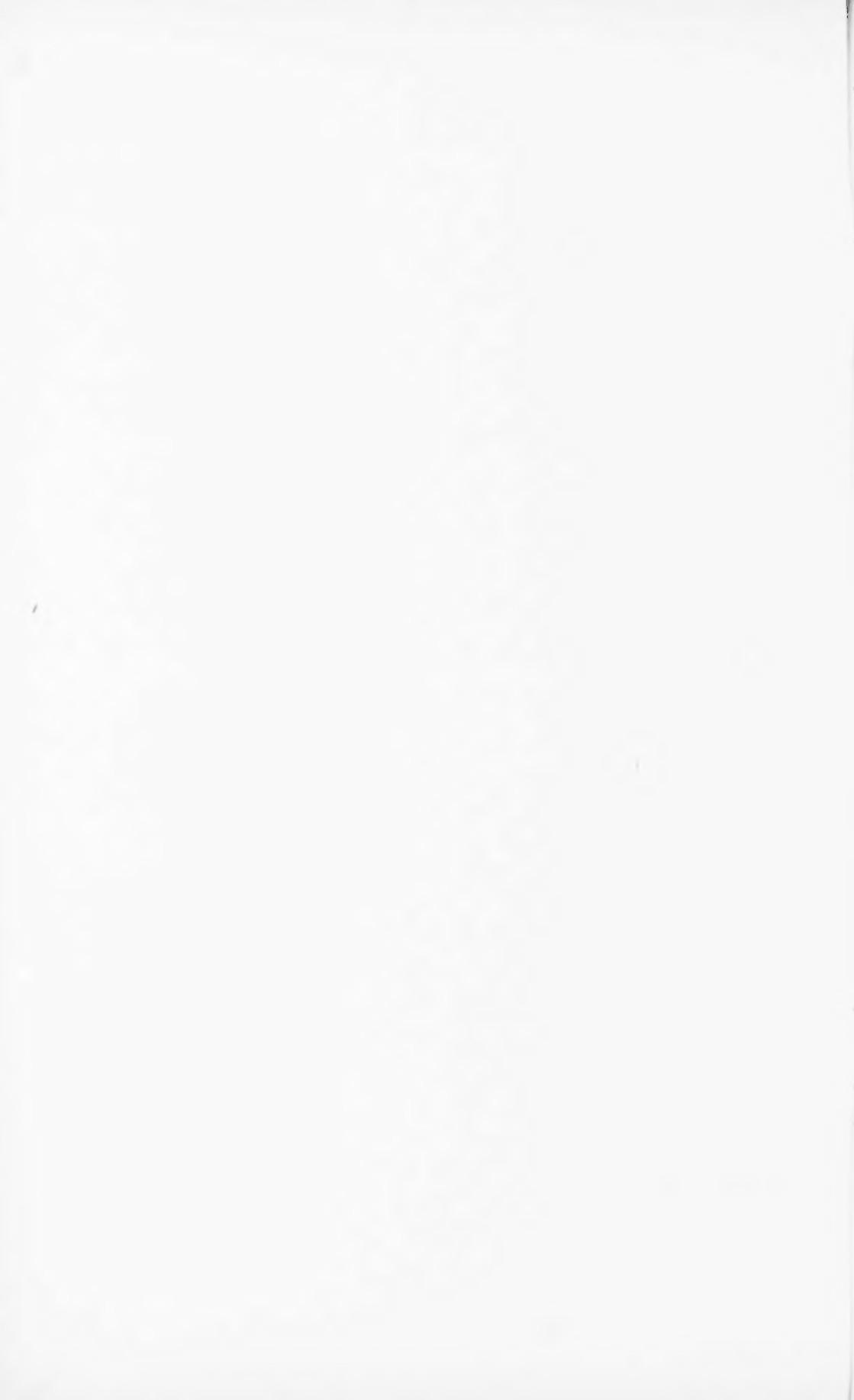


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IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

No. 86-823

MOBIL OIL CORPORATION,
Petitioner,
v.

BOARD OF TRUSTEES OF THE INTERNAL
IMPROVEMENT TRUST FUND OF THE
STATE OF FLORIDA,
Respondent.

On Writ of Certiorari to the Supreme Court of Florida

PETITIONER'S REPLY BRIEF

A somewhat unruly Armada has again put to sea under the flag of Florida. But, for most of this most recent journey, these great men-of-war (joined by lesser vessels from the State's Coastal allies) sail clean past our modest fleet without actual engagement or even an exchange of words, rough or smooth. Instead, the Floridian gallions fire loud broadsides at wholly imaginary ships ploughing a conveniently foolhardy course, and, perhaps deceived by the noise and smoke of their own guns, promptly claim victory. Our prime task, accordingly, is to set aside the elaborate fiction and very briefly to re-

state *our* arguments, as distinguished from those invented for us.

1. THE PRESENCE OF FEDERAL QUESTIONS

Respondent denies that this Court has jurisdiction to entertain the case, insisting that it presents no federal question (Opp. 3, 23). Much reliance is placed on the decision of the Eleventh Circuit in a related case referred to as *Mobil I*, now reproduced in full (Opp. App. C. 3a-33a). See Opp. 5 n.2, 12 and n.8, 23-24, 30 n.20, 28-29 and n.18, 31. But, of course, the holding there was that the federal *district court* had no jurisdiction to hear the case as one "arising under" federal law.¹ As we have previously noted (Pet. 15 n.11), that does not resolve the question whether this Court may hear the case under 28 U.S.C. 1257(3) because a federal "title, right, privilege or immunity" was "specially set up or claimed" in response to the defendant's plea or the state court's ruling. What is more, the jurisdiction of every federal court depends in large measure on the pleadings and arguments of the parties and the fact is that the federal questions presented here were not at issue in *Mobil I*.

We have already fully stated the extent to which the federal issues were raised below (Pet. 15-17) and need not recapitulate. We confine ourselves to three points Respondent has sought to muddle. First, petitioner did not stress the constitutional "taking" argument in the Florida Supreme Court and did not urge that court to reach it because we reasonably supposed the court would

¹ Similarly, *Heirs of Burat v. Board of Levee Com'rs of Orleans, etc.*, 496 F.2d 1336 (5th Cir. 1974), and *Mays v. Kirk*, 414 F.2d 131 (5th Cir. 1969), cited by Respondent, decide only the absence of federal district court jurisdiction under 28 U.S.C. 1331. The further holding in *Mays* that the federal question alleged must be substantial obviously has no relevance when the party relying on federal law has been denied his federal claim by a determination that is plainly wrong under controlling decisions of this Court.

follow its own precedents and affirm the lower courts on state law grounds. Second, given that the holding of the court below was *not* predictable, it was sufficient to interpose the federal constitutional objection on motion for re-hearing and that court's failure expressly to deal with the question cannot affect this Court's power to consider it. See Pet. 15-16. And, finally, once its jurisdiction attaches, this Court is *not* precluded from noticing a federal question that is presented by the record even if it has not been adequately preserved by the petitioner. See Pet. 16-17.

2. RIPENESS AND FINALITY

We are heartened to note that, while disputing its substance, Respondent apparently concedes the ripeness of the statutory question under the Swamp Lands Act. But the submission is that it would be premature to now consider the constitutional "taking" issue. Again, we have anticipated the objection and need not repeat ourselves. See Pet. 17-18. Two supplementary comments will suffice.

Contrary to Respondent's suggestion, it is self-evident that the decision of the Florida Supreme Court has already deprived petitioner of security of title, a thing of substantial value. One hardly needs judicial precedent for the proposition that a title to real property which, under existing law, was unimpeachable is greatly depreciated by a change of law that exposes it to challenge in expensive and protracted litigation, the outcome of which must always be uncertain considering the distant historical evidence that governs the result. Nor is it difficult to appreciate that thus converting a merchantable title into a mere precarious claim amounts to a taking of property in the constitutional sense. The costs and delays incurred in obtaining governmental permission to develop land may be part of the burden of doing business in modern society (*e.g.*, *Williamson Planning Comm'n v. Hamilton Bank*, No. 84-4 (June 28, 1985),

slip op. 3-4 (Stevens, J., concurring); but few would suggest the same approach when a new rule requires the owner to undergo onerous litigation and prolonged uncertainty merely to preserve his fee title.

The other point we would stress is that, in terms of ripeness, this case presents no problems comparable to those that concerned the Court in *Williamson County* or *MacDonald, Sommer & Frates v. Yolo County*, No. 84-2015 (June 25, 1986). Here, there is no outstanding question how far the challenged rule will bite—whether it will merely limit a planned development or deny all economic use of the property—that remains to be determined in further proceedings. In our case, if petitioner loses at trial, the extent of the loss is not uncertain: it will be wholly deprived of the affected land. So, also, there is for petitioner no possibility of compensation under State law for the “taking” of its property. The decision of the Florida Supreme Court leaves no such opening and there is no “court of claims” in Florida to which petitioner can apply.

3. THE STATUTORY ISSUE

We have submitted that the final determination, shared by federal and State authorities and solemnized in a federal patent, that specific lands qualify as “swamp or overflowed” within the meaning of the 1850 Act of Congress—and therefore were not “equal footing” or “sovereignty” lands—is unimpeachable at this late date, even by the State. Of course, this proposition, standing alone, does not establish petitioner’s title to the lands in suit: petitioner claims solely under State deeds that encompass the disputed parcels. What we do say—and it is all we say—is that Florida cannot impugn the force of its own deeds by challenging the validity of the underlying federal patents issued under the Swamp Lands Act. To be sure, the federal question arises only because State law, at least until recent times, differentiated between “equal footing” (or “sovereignty”) lands and Swamp Act lands,

permitting the Board of Trustees to alienate only the latter, and because, in this case, the Trustees have chosen to defend on the ground that the disputed lands were not correctly classified as "swamp or overflowed" in the 1850's. In effect, it is *the State* that has introduced the Swamp Lands Act as an issue and made it the dispositive point in the case.² But that cannot deprive petitioner of its right to invoke the statute and to seek its vindication in this Court.

On the merits, there is nothing remarkable about the rule that the ultimate determination of the federal Land Department as to the classification of land is conclusive, at least as to the actual or putative participants in the proceedings who did not then contest the administrative decision. The most recent illustration is the *Summa Corporation* case, so holding with respect to determinations under an 1851 Act passed by the same Congress as our 1850 statute. Indeed, the Trustees apparently now accept the proposition, acknowledging that "federal patents issued pursuant to [the Swamp Lands] Act [are] 'conclusive against any collateral attack'" (Opp. 25), and endorsing the ruling in *Mays v. Kirk*, *supra*, which treated the point as black-letter law. See 414 F.2d at 134-136.³

² Thus, there would be no Swamp Lands Act question if, before the deeds relied upon here, Florida law had not authorized its Board of Trustees to sell lands acquired by the State under that statute.

³ There is no basis for the suggestion (Opp. 31) that the Trustees' present challenge to the classification of the lands under the Swamp Act is not "collateral" because no "third parties" are involved. On the contrary, as *United States v. Coronado Beach Co.*, 255 U.S. 472 (1921), sufficiently illustrates, a bar on "collateral attack" applies equally to the original participants in the statutory proceedings. And it is frivolous to argue that the patents are not being impeached here because petitioner, as movant on a motion for summary judgment, must assume the navigability of the Peace River in 1845. The whole point of conclusiveness is to foreclose re-examination of a determination that might turn out to be erroneous if litigated. See, e.g., *United States v. Coronado Beach Co.*, *supra*, 255 U.S. at 487-488.

As we have already noted (Pet. 20), *Summa* has made clear that there is no basis for exempting State "sovereignty" interests. Respondent's reliance on *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.* 429 U.S. 363 (1977), is wide of the mark. The question here is not what law governs subsequent dispositions of the land or later physical changes, but whether the property was transferred from the United States by a patent issued under the Swamp Lands Act of 1850 or, rather, by virtue of the Equal Footing Doctrine at statehood. That, as *Corvallis* recognizes, is a matter controlled by federal law. And if, as *Summa* holds with respect to the comparable 1851 Act, the governing federal statute gives conclusive force to a determination made thereunder—even though erroneous—that federal rule is binding on the State.

We stress, finally, that Respondent cannot avoid this result by asserting that the United States lacked power to convey the riverbed under the Swamp Lands Act because those submerged lands had already passed to Florida upon its admission to the Union in 1845—if the relevant stretch of the Peace River was then navigable, as claimed. That argument was rejected under the 1851 Act in *United States v. Coronado Beach Co.*, *supra*, 255 U.S. at 487-488, as this Court noted in *Summa*, 466 U.S. at 209. And, indeed, *Summa* itself stands for the same proposition.⁴ A like rule, we submit, applies to determina-

⁴ Respondent notes language in *Summa* alluding to the power of the United States, before statehood, to alienate the beds of navigable waterbodies when necessary "to discharge its international duty" under the Treaty with Mexico. See 466 U.S. at 205-206 and n.4. But the fact is that the Court in *Summa* left unresolved the question whether the public trust easement claimed by California had been reserved by Mexico when it granted the land to petitioner's predecessors. *Id.* at 201 n.1. If so, the United States had no treaty obligation to confirm that interest in the Mexican grantees. Under Respondent's argument, the easement would instead have inured to the State upon its admission to the Union and the later federal patent could not transfer the interest elsewhere. Yet, the Court gave conclusive effect to the patent, even if over-generous, on the ground that the State failed to interpose a timely objection.

tions under the 1850 Swamp Lands Act, the State being bound by its contemporaneous acquiescence in the land classification. *Cf. McCormick v. Hayes*, 159 U.S. 332, 347-48 (1895); *Rogers Locomotive Mach. Works v. American Emigrant Co.*, 164 U.S. 559, 575-577 (1896).

4. THE CONSTITUTIONAL ISSUE

If we correctly understand Respondent's answer to our constitutional argument, it is perverse indeed. The trick is to say that nothing can have been "taken" if, at trial on remand, it is determined that petitioner never had a title to the land in issue. Opp. 35-36, 38-39. But see Opp. 39 n.27. That is, of course, precisely the kind of manipulation that we complain of: a belated, retroactive declaration that private rights solemnized by formal deeds from the State, enjoyed with official acquiescence for a century, and expressly acknowledged in litigation as recently as 1965,⁵ never really existed at all. Our submission is simply that such confiscation of vested title to land no less offends the federal Constitution when accomplished by judicial re-definition of the law than if attempted by executive or legislative action.

The only inquiry is whether the Florida Supreme Court has in fact changed the rules so as to permit such an expropriation. That, however, is a matter for this Court, not a state trial court. We do not pursue the debate at this time, except to note that, like the Florida Supreme Court itself, Respondent wholly ignores four of the most relevant precedents (see Pet. 11, 32), downgrading the fifth (*Odom v. Deltona Corp.*) to a footnote which merely quotes the court below (Opp. 52 n.38),⁶ and nowhere

⁵ See *Burns v. Coastal Petroleum Co.*, 194 So. 2d 71, 74 (Fla. 1st DCA 1966), cert. denied, 201 So.2d 549 (Fla.), cert. denied, 389 U.S. 913 (1967). See also Pet. 7, 9. Unsurprisingly, Respondent ignores this decision.

⁶ For a full statement of the relevance of the *Deltona Corp.* decision, see Brief of Amicus Curiae, Florida Land Title Association, Inc., at 15-17.

rebuts our explanation of the four older cases invoked below as stating an *exception*, not the general rule (see Pet. 22-23). This failure to face up to the difficulties strongly suggests that the decision below is as unprecedented and unprincipled as we have charged.

CONCLUSION

For the reasons stated here and in the petition, a writ of certiorari should be issued to review the decision of the Florida Supreme Court.

Respectfully submitted.

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JANUARY 1987

IN THE
Supreme Court of the United States

OCTOBER TERM, 1986

MOBIL OIL CORPORATION,

Petitioner,

v.

**BOARD OF TRUSTEES OF THE INTERNAL
IMPROVEMENT TRUST FUND OF THE
STATE OF FLORIDA,**

Respondent.

**ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA**

**BRIEF OF AMICUS CURIAE
COASTAL PETROLEUM COMPANY**

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INTEREST OF THE AMICUS CURIAE

Coastal Petroleum Company (Coastal) appears as Amicus Curiae pursuant to Rule 36 by consent of the parties. Coastal is lessee of the upstream portion of the Peace River in central Florida, the ownership of which is the issue in this case, pursuant to Lease 224-B granted by the Board of Trustees of the Internal Improvement Trust Fund (Trustees). Coastal's Lease has been determined to include minerals. *Collins v. Coastal Petroleum Co.*, 118 So.2d 796 (Fla. 1st DCA 1960). Coastal and the Trustees, in related litigation, are seeking damages for wilful conversion of minerals from these beds of the Peace River by Mobil.

Coastal was a party defendant in the trial court, but did not appeal the adverse decision. Since Coastal's conversion claim for past mining in related cases was not affected by a determination of title on the date of the quiet title judgment, Coastal chose not to appeal the summary judgment. When the intermediate appellate court wrote an opinion in this case, after unappealable per curiam affirmances in four similar cases, review of the decision became important. Coastal participated as Amicus Curiae before the Florida Supreme Court. In consolidated proceedings before the Florida Supreme Court, Coastal was a party. *Coastal Petroleum Co. v. American Cyanamid Co.*, 492 So.2d 339 (Fla. 1986).

Coastal's lease interest is therefore affected by the issues before this Court.



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IN THE
Supreme Court of the United States

OCTOBER TERM, 1986

MOBIL OIL CORPORATION,

Petitioner,

v.

**BOARD OF TRUSTEES OF THE
INTERNAL TRUST FUND
OF THE STATE OF FLORIDA,**

Respondent.

**ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA**

**BRIEF OF AMICUS CURIAE
COASTAL PETROLEUM COMPANY**

STATEMENT OF THE CASE

A. The Peace River. The river involved here is the Peace River. The Peace River rises north of Bartow, Florida, and flows southwestward to Charlotte Harbor, a distance of approximately 100 miles. Portions of the main channel of the river bed are claimed by Mobil. The public use and characteristics of this navigable river, however, have been addressed by Lynn Ware's affidavit in opposition to summary judgment (R 421). This is one of Florida's major river systems and enjoys a long involvement in Florida history. Although the Peace River is not meandered in the area, the federal surveyor was given special instructions

which did not require meandering. A-3. These special instructions included the entire area downstream to immediately where meandering began by another surveyor (R 388, 412).

B. Mobil's Recognition of State Ownership. Internal documents¹ found in discovery show Mobil's own recognition of the navigability of the Peace River. A-4, 5, 6. In purchasing lands along the Peace River, Mobil would not pay Mr. Mann for the bed of the Peace River because it recognized that the bed of the Peace River was "... not owned by Mr. Mann, but by the State of Florida. . ." A-6. Yet Mobil now claims to own this very part of the bed of the Peace River.

C. Mobil's Mining of the bed of the Peace River. In discovery, Coastal found a letter from Mobil to International Minerals & Chemical Corporation in which Mr. Hughes tells Mr. Feigin of a visit by a Coastal consultant, Mr. Mayberry. In that letter, Mobil again acknowledges State ownership of the river bed and recognizes the damages if mining of the river bed was determined. Mobil's Hughes sought IMC's Feigin's cooperation in deceiving Coastal. A-4, 5.

D. Suit Against Mobil for Conversion. In August, 1961, Mobil was aware of the State's ownership of the river bed; that the high water mark defined the limits of the river bed; and that if the level of the river were determined, Mobil would be responsible for damages. A-4, 5. What is clear is that Mobil did not tell Coastal's consultant the truth and asked IMC to take the same position.

¹Of course, some might disagree with the interpretations or inferences of this correspondence, but it must be remembered that the final judgment was a summary judgment and all reasonable inferences must be made against Mobil here. The trial court ignored these facts and based its judgment on conclusions of law.

Mobil, when called upon to defend the claims for mining in the bed of the Peace River, presented quite a different response than the foregoing facts would lead one to expect. In *Mobil Oil Corporation v. Coastal Petroleum Company*, Case No. 76-2078 (Mobil I), now pending in Leon County, Florida Circuit Court, Mobil for the first time² claimed the river was *conveyed* by federal patents³ and swamp and overflowed lands' deeds. A-2. Mobil claimed title by federal grants or "patents" to private persons after statehood, and by state deeds (swamp and overflowed lands deeds) which would have had to have been issued by the state based upon its receipt of fee simple title from conveyances by federal patents issued pursuant to the *Swamp & Overflowed Lands Act, September 28, 1850, 43 U.S.C. 982*. In each case, Mobil claimed title by chaining title back to federal patents, directly or indirectly. These conveyances relied upon by Mobil were by section or subsection and not by metes and bounds descriptions. The conveyances did not indicate transfer of or even a reference to the bed of the Peace River, but merely were the conveyance by gross description.

E. The Florida Supreme Court Decision. Mobil then brought a series of cases in the lower court, including this case. On appeal of this case, three certified questions⁴ were presented to the Florida Supreme Court. When the answers were given, no earthquake was felt, no surprise was expressed, no lands were grabbed. The well-established law of Florida had been reaffirmed as alive and well. Mobil had

² Such pretense is consistent with the beginning of the phosphate industry. See A-7.

³ The present case includes only swamp and overflow deeds, but it can hardly be claimed that federal patents are not involved in the controversy as Mobil itself has pleaded in Mobil I. A-2. No such federal patents under the certain and unambiguous decisions of this Court, can include the bed of this navigable river. See Argument p. 4-8, herein.

⁴ The certified questions stated by Mobil are considerably misstated from those actually certified. Compare p. 1 of the Petition with 2a of Mobil's Appendix.

sought to change that body of law so that, despite its inequitable position, it could hide behind paper.

Mobil has now petitioned this Court seeking review in a last attempt to change the well-established property law of Florida.

SUMMARY OF ARGUMENT

Coastal respectfully submits that certiorari should not be granted for two reasons:⁵

I. Mobil seeks to overturn what the Florida Supreme Court in this case termed "well-established" property law of the State of Florida (*Coastal Petroleum Co. v. American Cyanamid Co.*, 492 So.2d 339 (Fla. 1986), Mobil's Appendix, p. 9A) and of the United States and thereby create a private title to a bed of a navigable stream in Florida.

A. Federal patents may not convey the beds of navigable streams in Florida, *Shively v. Bowly*, 152 U.S. 1 (1893). Federal patents are open to the question of jurisdiction over the lands. *Borax Consolidated, Ltd. v. Los Angeles*, 296 U.S. 10 (1935), and *Summa Corp. v. California ex rel. Lands Commission*, 466 U.S. 198 (1984). The federal patents Mobil claims under do not provide any unimpeachable title; nor do the enabling federal patents to the States, which were the prerequisite for the States' swamp and overflow deeds.

B. Florida swamp and overflow deeds have always been held not to include the beds of navigable rivers and lakes.

⁵Untimely raising of the "federal" issues is an additional reason for not reviewing the decision of the Florida Supreme Court here. *McCullough v. Kammerer Corp.*, 323 U.S. 327 (1945).

II. There is no substantive due process question. Mobil knew when it purchased adjacent lands that the State of Florida owned the bed of the Peace River. Mobil's mining of the bed of the Peace River was an intentional conversion of minerals not protected by any provision of the Constitution.

ARGUMENT

I. What is before the Court in essence is the petition of Mobil to overturn well-established, well-reasoned Florida and Federal property law to create a private title to the bed of a navigable river in Florida.

Mobil begins by contending that it has unimpeachable title to the bed of a navigable stream by virtue of Federal and Florida law. An analysis of the law reveals the absence of any title to a navigable river bed, let alone any "unimpeachable title." In fact, Mobil attempts to change the law by this proceeding to create title in the first instance.

A. In *Summa Corp. v. California ex rel. Lands Commission*, 466 U.S. 198, 205 (1984), the Court stated the rule⁶ governing federal patents:

"The Federal Government, of course, cannot dispose of a right possessed by the State under the equal-footing doctrine of the United States Constitution. *Pollard's Lessee v. Hagan*, 3 How 212, 11 L.Ed. 565 (1845). Thus, an ordinary federal patent purporting to convey tidelands located within a State to a private individual is invalid, since the United States holds such tidelands only in trust for the State. *Borax, Ltd. v. Los Angeles*, 296 U.S. 10, 15-16, 80 L.Ed. 9, 56 S.Ct. 23 (1935)."

⁶The Court, in *Borax*, distinguished the unusual case involved in *Summa*: where the Federal government in discharging ". . . its international duty with respect to land which, although tideland, had not passed to the state." *Summa, supra*, at 243. Mobil ignores this significant limitation in *Summa*.

In *Borax Consolidated, Ltd. v. Los Angeles*, 296 U.S. 10 (1935), the Court contrasted two situations: one involving an attack on the exercise of judgment in granting federal patents; and one involving a question as to the authority or jurisdiction over the lands in the first instance:

"2. As to the land in suit, petitioners contend that the General Land Office had authority to determine the location of the boundary between upland and tideland and did determine it through the survey in 1880 and the consequent patent to Banning, and that this determination is conclusive against collateral attack; in short, that the land in controversy has been determined by competent authority not to be tideland and that the question is not open to reexamination. Petitioners thus invoke the rule that 'the power to make and correct surveys belongs to the political department of the government and that, whilst the lands are subject to the supervision of the General Land Office, the decisions of that bureau in all such cases, like that of other special tribunals upon matters within their exclusive jurisdiction, are unassailable by the courts, except by a direct proceeding.' R.S., 453, 2395-2398, 2478; 43 U.S.C. 2, 751-753, 1201. *Cragin v. Powell*, 128 U.S. 691, 698, 699; *Heath v. Wallace*, 138 U.S. 573, 585; *Knight v. United States Land Assn.*, supra; *Stoneroad v. Stoneroad*, 158 U.S. 240, 250, 252; *Russell v. Maxwell Land Grant Co.*, 158 U.S. 253, 256; *United States v. Coronado Beach Co.*, 255 U.S. 472, 487, 488.

But this rule proceeds upon the assumption that the matter determined is within the jurisdiction of the Land Department. *Cragin v. Powell*, supra.

* * * *

This contention encounters the principle that the question of jurisdiction, that is, of the competency of the Department to act upon the subject matter, is always one for judicial determination. 'Of course,' said the Court in *Smelting Co. v. Kemp*, 104 U.S. 636, 641, 'when we speak of the conclusive presumptions attending a patent for lands, we assume that it was issued in a case where the department had jurisdiction to act and execute it; that is to say, in a case where the lands belonged to the United States, and provision had been made by law for their sale. If they never were public property, or had previously been disposed of, or if Congress had made no provision for their sale, or had reserved them, the department would have no jurisdiction to transfer them, and its attempted conveyance of them would be inoperative and void, no matter with what seeming regularity the forms of law may have been observed.' The Court added that questions of that sort 'may be considered by a court of law'; for in such cases 'the objection to the patent reaches beyond the action of the special tribunal, and goes to the existence of a subject upon which it was competent to act.' *Id.* See, also, *Polk v. Wendall*, 9 Cranch 87, 99; *Moore v. Robbins*, 96 U.S. 530, 533; *Wright v. Roseberry*, 121 U.S. 488, 519; *Doolan v. Carr*, 125 U.S. 618, 625; *Hardin v. Jordan*, 140 U.S. 371, 401; *Crowell v. Benson*, 285 U.S. 22, 58, 59." *Borax, supra*, p. 16-18.

Thus, while a federal patent is conclusive as to matters of judgment, it is not conclusive as to the authority or jurisdiction to act in the first instance:

"Was it upland, which the United States could patent, or tideland, which it could not? Such a

controversy as to title is appropriately one for judicial decision upon evidence, and we find no ground for the conclusion that it has been committed to the determination of administrative officers." *Borax*, *supra*, p. 18, 19.

In cases⁷ like *Shively v. Bowly*, 152 U.S. 1, 58 (1893), this Court has inquired into jurisdiction of federal patents issued even before statehood of the territory involved:

"The United States, while they hold the country as a territory, having all the powers both of national and of municipal government, may grant, for appropriate purposes, titles or rights in the soil below high water mark of tide waters. But they have never done so by general laws; and, unless in some case of international duty or public exigency, have acted upon the policy, as most in accordance with the interest of the people and with the object for which the territories were acquired, of leaving the administration and disposition of the sovereign rights in navigable waters, and in the soil under them, to the control of the states, respectively, when organized and admitted into the Union.

Grants by Congress of portions of the public lands within a territory to settlers thereon, though bordering on or bounded by navigable waters, convey, of their own force, no title or right below high water mark, and do not impair the title and dominion of the future state when created; but

⁷ The federal cases cited by Mobil involve questions of judgment and not questions of authority or jurisdiction. *French v. Fyan*, 93 U.S. 169, 171 (1876), limited the Secretary's unimpeachable acts to "... matters ... within the scope of his authority" *McCormick v. Hayes*, 159 U.S. 332 (1895), cited this same limitation in *French*, 341, and relied upon *French*, 348.

leave the question of the use of the shores by the owners of uplands to the sovereign control of each state, subject only to the rights vested by the Constitution in the United States."

Thus, the unimpeachable law of these United States, as consistently held by this Court, is that federal patents, with the exception of international considerations, must rest on lawful jurisdiction or the federal patents will be open to a question of jurisdiction.

Here the swamp and overflow conveyances⁸ were subsequent to enabling federal patents. Mobil specifically cites the portion of the *Swamp and Overflowed Lands Act* which also demonstrates the reliance on federal patents in its chain of title. Petition, p. 3. Under *Shively, Borax and Summa*, federal patents could not convey sovereignty lands. Now, if the predicate federal patents could not convey such beds of navigable streams, how is it that subsequent Florida swamp and overflow deeds, predicated on these federal patents, are supposed to do so?⁹ Clearly, under Federal law, the predicate federal patents are subject to inquiry as to jurisdiction and are not conclusive on their face, *Borax, supra*. No sovereignty stream beds could have been conveyed by such federal patents, *Shively, supra*.

Florida, too, has adopted this same legal distinction in considering questions raised about swamp and overflow deeds following the enabling federal patents. For example, with respect to lands received for military reservations, see

⁸ The claims in issue in the Mobil cases include federal patents, A-2. As to these federal patents, *Shively* unquestionably ends any claim to the bed of navigable streams in Florida.

⁹ A different rule governing the conclusion as to federal patents and as to State deeds would result in intermittent pieces of publicly and privately owned navigable river bed.

Florida Town Imp. Co. v. Bigalsky, 44 Fla. 771, 33 So. 450 (1902), and Section 16 lands dedicated to schools, see *State ex rel. Kittle v. Jennings*, 47 Fla. 302, 307, 35 So. 986, 995 (1903), where it was held:

"In support of our views, we further cite Leavenworth, Lawrence & Galveston R. Co. v. United States, 92 U.S. 733, text, 741, 742, 23 L.Ed. 634, St. Paul & S.C.R. Co. v. Winona & St. P.R. Co., 112 U.S. 720, 5 Sup. Ct. 334, 28 L.Ed. 872, and Wilcox v. McConnell, 13 Pet. 498, 10 L.Ed. 264, to the effect that, when land has been previously appropriated to another purpose, a subsequent grant by Congress cannot be supposed to include such land, unless there be an express declaration to that effect."

The beds of navigable streams involved passed to Florida on March 3, 1845 at statehood by virtue of equal footing. When Congress passed the *Swamp & Overflowed Lands Act, September 28, 1850*, 43 U.S.C. 982, these river beds had been earlier transferred by operation of law. Like its Federal counterpart, under Florida law, the subject of jurisdiction is open to inquiry.

Mobil seeks to overturn this Florida and Federal property law so that it may create a claim to the bed of a navigable stream.

B. Florida swamp and overflowed 'ands' deeds have always been held not to include the beds of navigable rivers and lakes. Mobil seeks again to change the law of Florida by first suggesting the Florida Supreme Court was acting by pretense.¹⁰ In its decision, the Florida Supreme Court held:

"...the following questions were certified as being of great public importance:

¹⁰See Petition, p.23.

I. Do the 1883 swamp and overflowed lands deeds issued by the Trustees include sovereignty lands below the original high-water mark of navigable rivers?

* * * * *

We answered the first certified question in the negative when we held in *Martin*, 93 Fla. at 573, 112 So. at 286-87 that:

The State Trustee defendants cannot by allegation, averment or admission in pleadings or otherwise affect the legal status of or the State's title to sovereignty, swamp and overflowed or other lands held by the Trustees under different statutes for distinct and definite State purposes The subsequent vesting of title to sovereignty lands in the Trustees for State purposes under the Acts of 1919 or other statutes does not make the title to sovereignty land inure to claimants under a previous conveyance of swamp and overflowed lands by the State Trustees who then had no authority to convey such sovereignty lands and did not attempt or intend to convey sovereignty lands.

Further,

[i]f by mistake or otherwise sales or conveyances are made by the Trustees of the Internal Improvement Fund of sovereignty lands, such as lands under navigable waters in the State or tide lands, or if such Trustees make sales and conveyances of State School lands, as and for swamp and overflowed lands,

under the authority given such Trustees to convey swamp and overflowed lands, such sales and conveyances are ineffectual for lack of authority from the state.

Id. at 569, 112 So. at 285 (citations omitted).

* * * * *

The first is whether the legislature intended to overturn the well-established law that prior conveyances to private interests did not convey sovereignty lands encompassed within swamp and overflowed lands being conveyed. We must assume that the legislature knew this well-established law when it enacted MRTA." Petition Appendix, 2a, 5a, 6a.

There has never been a case to the contrary involving navigable lakes and rivers where authority to convey was absent.¹¹ Mobil has not cited one to this Court! Mobil has attempted to distinguish the cases determining this issue against it over the history of Florida, but it fails to cite a single case to demonstrate any surprise or sudden change in the law.

The Florida Supreme Court was perfectly consistent in its approach. The answer it gave to the first certified question presented to it is the "well-established" law of Florida. Swamp and overflowed lands' deeds do not convey the beds of sovereign lakes and rivers any more than federal patents do. Mobil's attempt to change the property law of Florida to create a title to the beds of navigable streams is

¹¹ *Pembroke v. Peninsular Terminal Co.*, 108 Fla. 46, 146 So. 249 (1933), involving tidal areas, *Trustees of the Internal Improvement Fund v. Lobeau*, 127 So.2d 98 (Fla. 1961), involving tidal areas subject to sale, and *Trustees of the Internal Improvement Fund v. Wetstone*, 222 So.2d 10, 12 (Fla. 1969), involving only a boundary question and recognizing the well-established law. *Odom v. Deltona Corp.*, 341 So.2d 977, 988 (Fla. 1976), even cited *Martin v. Busch*, 93 Fla. 535, 112 So. 274 (1927), with favor and recognized the well-established law could not be "doubted," at 981.

not a proper subject for certiorari. Mobil has no unimpeachable title by Federal or Florida law. The Petition should not be considered.

II. Not only is the Florida law that swamp and overflowed lands' deeds do not convey navigable water bottoms so well established that one should not be surprised or term the decision a legal "earthquake," but Mobil knew it did not own the bed of the Peace River. The feigned surprise is at odds with Mobil's own correspondence.

In considering the purchase of tracts of land, Mobil not only recognized that the State of Florida owned the bed of the Peace River, but also refused to pay for any part of such tracts as appeared to be in the Peace River, A-6. In fact, when Coastal inquired as to whether Mobil would mine Coastal's leased areas, Mobil represented there were no commercial deposits of minerals there and discouraged Coastal. This deceit was disclosed in discovery in an inter-company letter from Mobil to another phosphate company in which Mobil acknowledged State ownership of the bed of the Peace River and the damages that Mobil would suffer if the conversion were determined, A-4, 5. Mobil only feigns surprise and legal earthquakes.¹²

Under federal notions of substantive due process, there is a taking only where the reasonable expectations of a party are upset by an unforeseen or sudden change in state law. *Hughes v. Washington*, 389 U.S. 290, 296 (1967). Mobil does not seek to protect against a taking; it seeks to establish a new title by changing the "well-established" law of Florida. The case should not be reviewed.

¹² Under Florida law, the doctrines of "equitable estoppel," *Trustees of the Internal Improvement Fund v. Claughton*, 86 So.2d 775 (Fla. 1956), and "betterment," Section 66.041, *Florida Statutes* (1985), protect citizens from inequity. Mobil seeks to change the law because it can show neither equity nor any improvement of the areas in issue. Mobil simply took minerals it knew it did not own.

CONCLUSION

Mobil Oil Corporation has failed to establish any unimpeachable title resting upon Federal or Florida law. Mobil seeks to create title by urging a reversal of long-standing property law governing federal patents, state deeds, and sovereignty lands.

Mobil was not surprised by the decision of the Florida Supreme Court because it has always believed the State of Florida owned the bed of the Peace River. Yet Mobil mined and deceived to hide its conversion of minerals from the bed of the Peace River.

No protected federal interest is involved, either under the Laws or Constitution of the United States. The cause should not be reviewed.

Respectfully submitted,

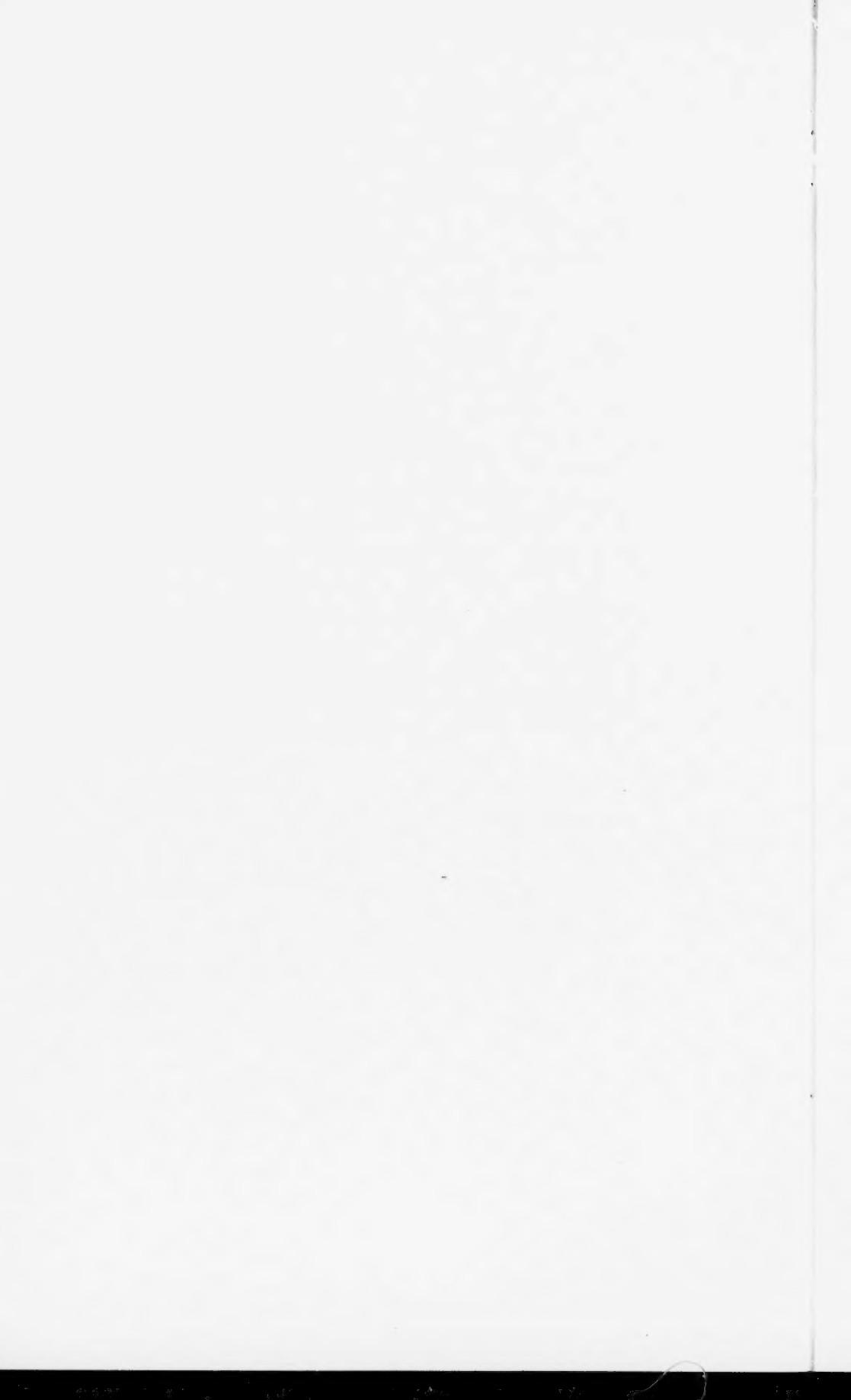
ROBERT J. ANGERER
Counsel of Record
IRVING R.M. PANZER
C. DEAN REASONER

Attorneys for Amicus Curiae
Coastal Petroleum Company

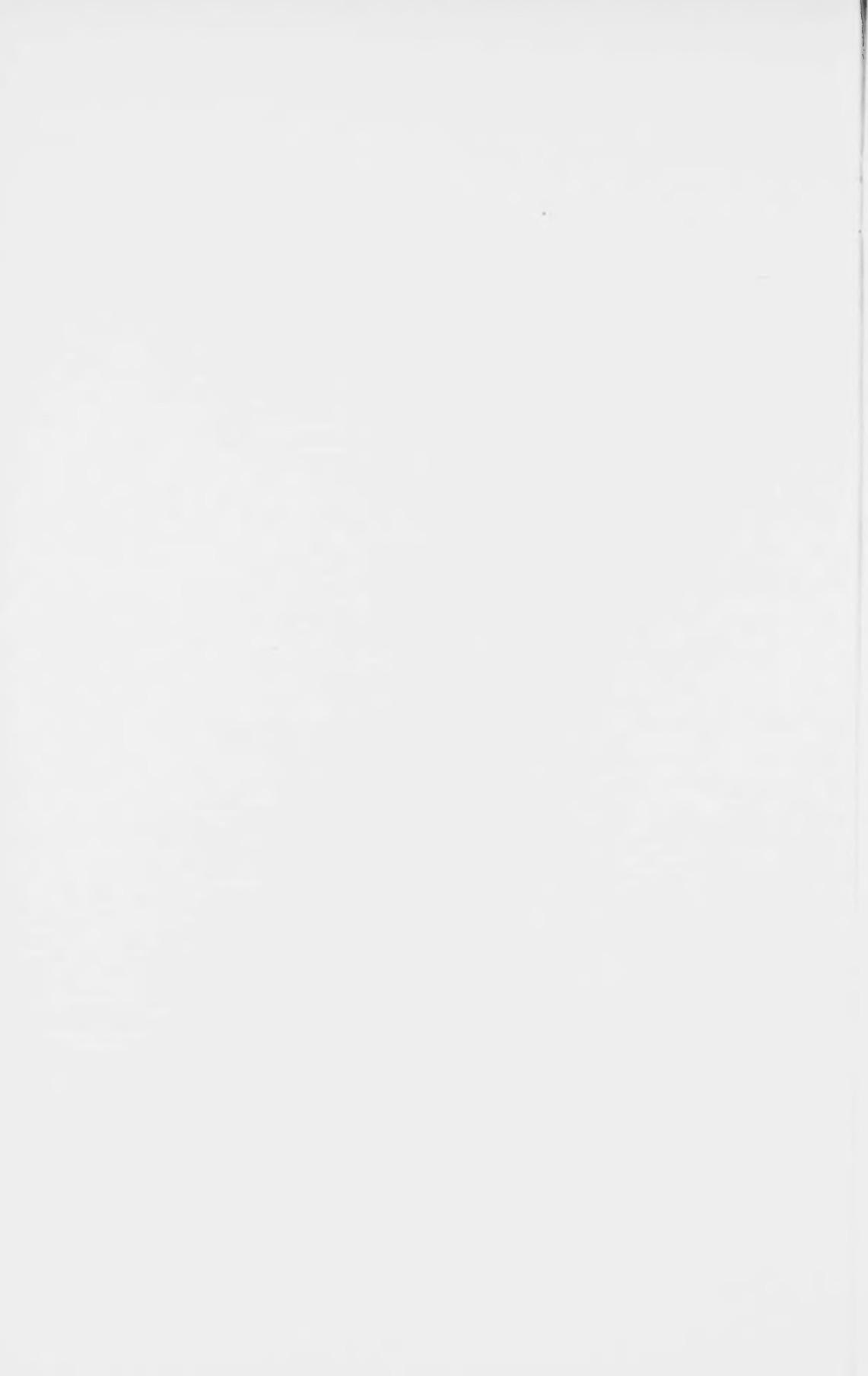
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that all parties required to be served have been served, as follows: three copies of the Brief of Amicus Curiae Coastal Petroleum Company were served by United States Mail to JULIAN CLARKSON, Holland & Knight, P.O. Drawer 810, Tallahassee, FL 32302, Counsel for Mobil Oil Corporation, and to PARKER D. THOMPSON, 200 South Biscayne Blvd., Suite 4900, Miami, FL 33131-2363, Counsel for the Board of Trustees of the Internal Improvement Trust Fund of the State of Florida, and additional copies were mailed to the following additional Counsel: LOUIS F. CLAIBORNE, Wrawby House, Park Road, Wivenhoe, Essex, England, CHARLES H. KIRBO, King & Spalding, 2500 Trust Company Tower, Atlanta, GA 30303, LOUIS F. HUBENER, Dept. of Legal Affairs, Suite 1501, The Capitol, Tallahassee, FL 32301, LEE R. ROHE, Esquire, Dept. of Natural Resources, 3900 Commonwealth Blvd., Tallahassee, FL 32303, and BARRY S. RICHARD, Post Office Drawer 1838, Tallahassee, FL 32302, this 6th day of January, 1987.

Irving R.M. Panzer



APPENDIX



APPENDIX

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ATTACHMENT C (R 121)
(To Coastal Petroleum Company's Motion to Dismiss, R 105)

(MOBIL I)
ANSWER AND DEFENSES TO COUNTERCLAIM
TO SECOND AMENDED COMPLAINT (R 122)

Plaintiff, MOBIL OIL CORPORATION ("Mobil"), files its answer and defenses to the counterclaims of COASTAL PETROLEUM COMPANY ("Coastal"), as follows:

* * * * *

AFFIRMATIVE DEFENSES
TO SECOND COUNTERCLAIM

1. All lands on which Mobil is mining or has mined were patented or deeded out of the United States of America or the State of Florida and into private ownership; none of the lands on which Mobil has mined are sovereignty lands, nor were they sovereignty lands on the date Lease 224-B was executed; all lands on which Mobil has mined were deeded to its predecessors in title or estate by the State of Florida or the United States of America.

AFFIDAVIT OF JOHN W. DUBOSE (R 380, 386, 387)

STATE OF FLORIDA
COUNTY OF LEON

BEFORE ME, the undersigned authority, personally appeared JOHN W. DUBOSE, who was duly sworn and states the following facts to be true:

* * * * *

26. One must carefully review all pertinent information such as the General Land Office Plats, field notes, contracts, general instructions and special instructions to each Deputy Surveyor to fully understand what was required of each Surveyor to fully discharge his responsibilities. To assume that each survey was done in accordance with one printed circular is misleading as the criteria changed with each contract and change in the needs of the area surveyed. The special instructions superseded the printed general instructions; for instance, the special instructions stated, 'Should any of your lines intersect a navigable stream or body of water of such depth and dimensions as to require meandering you will note the distance thereto and at said point of intersection establish a corner . . .' As can be seen by these special instructions, the decision to meander or not meander was left up to the surveyor.

AFFIDAVIT OF PHILLIP W. WARE (R 430, 431)

**STATE OF FLORIDA
COUNTY OF LEON**

BEFORE ME, the undersigned authority, personally appeared PHILLIP W. WARE, who was duly sworn and states:

* * * * *

5. Attached as Exhibit D is a true and accurate copy of a letter produced to attorneys for Coastal Petroleum Company by Mobil Oil Corporation dated August 4, 1961, from C.V.O. Hughes to Harry Feagin [sic].

* * * * *

11. Attached as Exhibit J is a true and accurate copy of a letter produced to attorneys for Coastal Petroleum Company by Mobil Oil Corporation dated October 18, 1960, from C.V.O. Hughes to A.A. Farrell.

* * * * *

EXHIBIT D

August 4, 1961

Mr. Harry Feigin
International Minerals & Chemical Corporation
P.O. Box 867
Bartow, Florida

Dear Harry:

I had a visit from Dick Mayberry, in connection with the mineral values in the Peace River Valley. He said he was representing Coastal Petroleum Company, which had purchased a great amount of mineral rights from the State of Florida in various lakes and river flood plains. Dick was interested in discovering what kind of mineral content there was in the bed of Peace River, and in adjacent flood plains.

This reminded me that Lamar Johnson had once told me that Coastal Petroleum Company had some sort of vague generalized lease from the State of Florida on hundreds of thousands of acres of mineral rights. They had exercised these rights on some property that Lamar Johnson himself had under lease, near Lake Okeechobee. He told me that Coastal Petroleum had won an initial court judgment sustaining their right to go on to the surface premises of these lands to exercise their rights under the agreement they held from the State of Florida.

It occurred to me that possibly this is a roundabout way for someone to get an independent opinion of the value of mineral deposits in the Peace River Valley. Possibly someone who was already familiar with Coastal Petroleum has alerted them to this study, wanting to get some valuation of the worth of the mineral rights for other purposes.

I told Dick Mayberry that the phosphate mineral right in the bed of Peace River, or immediately adjacent, was in thin beds, low grade, and not at present commercially mineable. However, I want to make it clear that this statement does not cover that area of land that is beyond the immediate river bed, and does not in anyway change our own evaluation of the damages we might suffer should the river level be permanently held at an elevated value. In other words, there is no conflict between the very general statement that Coastal Petroleum might come up with, and our own evaluation of losses should the river levels be changed by dams built by the Peace River Valley water conservation and drainage district.

You may also be contacted by Dick Mayberry, or by Coastal Petroleum. We do not in any case recognize that Coastal Petroleum has mineral rights near Peace River that supersede ours. I made this clear to Dick Mayberry. The legal bed of the river, or the legal flood plain, has never been determined. Measurements along the river of high stage and low stage water are not detailed enough to describe accurately and legally a flood plain that might belong to the State of Florida, along with the bed of the river. I am assuming that your own position will be essentially the same.

Very truly yours,

s C.V.O. Hughes
Manager

CVOH dj

cc: Mr. Raymond W. Stuck
1230 Hopedale Drive
Ft. Myers, Florida

bcc: Mr. A.A. Farrell
Mr. D.H. Barnett
Mr. W.J. Menear

Nichols, Florida
October 18, 1960

GEORGE W. MANN 235 ACRES
Clear Springs Area

Mr. A.A. Farrell, Vice President
Mining Division - Richmond

Dear Andy:

When he was in to see Mr. Pascoe recently, G.W. (Floppy) Mann made the statement to Mr. Pascoe that he did not think he could purchase comparable land in Polk County for less than \$1,000. per acre.

This statement is slightly fantastic on the face of it. Mr. Mann's land is largely river swamp, and this kind of land is available at much lower prices than \$1,000. per acre. From my own experience in looking at cleared farm land in Polk and Hillsborough counties for personal reasons, I would say that land like this can be bought for \$200. per acre or less. I checked with Mr. Menear, and he thinks that some can be bought down around \$100. per acre near the south end of Polk County.

In order to make sure that we all know what we are talking about from a land standpoint, I asked Mr. Menear to make a rough survey of the land. Of the 235 acres, three acres is river which is not owned by Mr. Mann, but by the State of Florida; 34 acres are cypress swamp bordering the river; 53 acres are hardwood swamp bordering the cypress swamps; 30 acres are a muck pond located near the center west part of Mr. Mann's property; 105 acres is flat palmetto land, which might be considered unimproved and low yield pasture land; and 10 acres is hammock land that could be classified as marginal citrus land. I think that this will give a general idea as to what kind of property it is we are talking about.

CVOH/dj

cc: Mr. H.L. Pascoe
Mr. W.J. Menear

Very truly yours,

/s/ C.V.O. Hughes
Manager

AFFIDAVIT OF LYNN W. WARE (R 421, 426)

* * * * *

v. The discovery of phosphate on Peace River brought new activity. Phosphate hunts were made by prospective investors by floating down the river in boats and taking samples. Exhibits 30, 31 and 32 are three accounts of the investors' phosphate hunts.

* * * * *

EXHIBIT 32**THE FLORIDA PHOSPHATE INDUSTRY:
A History of the Development and Use of
a Vital Mineral, ARCH FREDRIC BLAKELY, pg. 21**

M.T. Singter, a well-known geologist from Alabama, and Mr. Pratt, a chemist of Atlanta, were engaged by the company to make a scientific examination of the area. McKee and M.G. Darbyshire of Ft. Meade accompanied the expedition. They bought supplies, chartered a boat, and started down Peace River on what they called a hunting trip. Pratt used the seclusion of his tent to make chemical tests of rock taken from the river beds. After phosphate which averaged 61 per cent BPL was found, the men agreed that "their discovery must be kept a graveyard secret" to prevent land costs from skyrocketing. They discussed the matter and devised a scheme by which they could buy all the lands wanted at their own price. The country for miles around was covered with saw palmetto bushes, and the conspirators decided to tell landowners that these palmetto roots were rich in tannic acid. An exposé of their plan three years later revealed:

It was agreed to announce that they intended starting a plant to extract the tannic acid, provided the property owners would sell them the land cheap enough; that as soon as they had grubbed out all the roots they would have no further use for the lands, and would sell them back to the owners for a mere song. The plan worked beautifully and soon, at very reasonable prices, they had deeds for all the land they desired.

The company soon secured forty-three miles of the river front, including both banks, making a total distance down the river of twenty-one and one-half miles.



Supreme Court, U.S.
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No. 86-823

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

MOBIL OIL CORPORATION,

Petitioner,

v.

BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT
TRUST FUND OF THE STATE OF FLORIDA,
Respondent.

**BRIEF OF AMICUS CURIAE,
FLORIDA LAND TITLE ASSOCIATION, INC.,
IN SUPPORT OF PETITION FOR A WRIT
OF CERTIORARI TO THE SUPREME
COURT OF FLORIDA**

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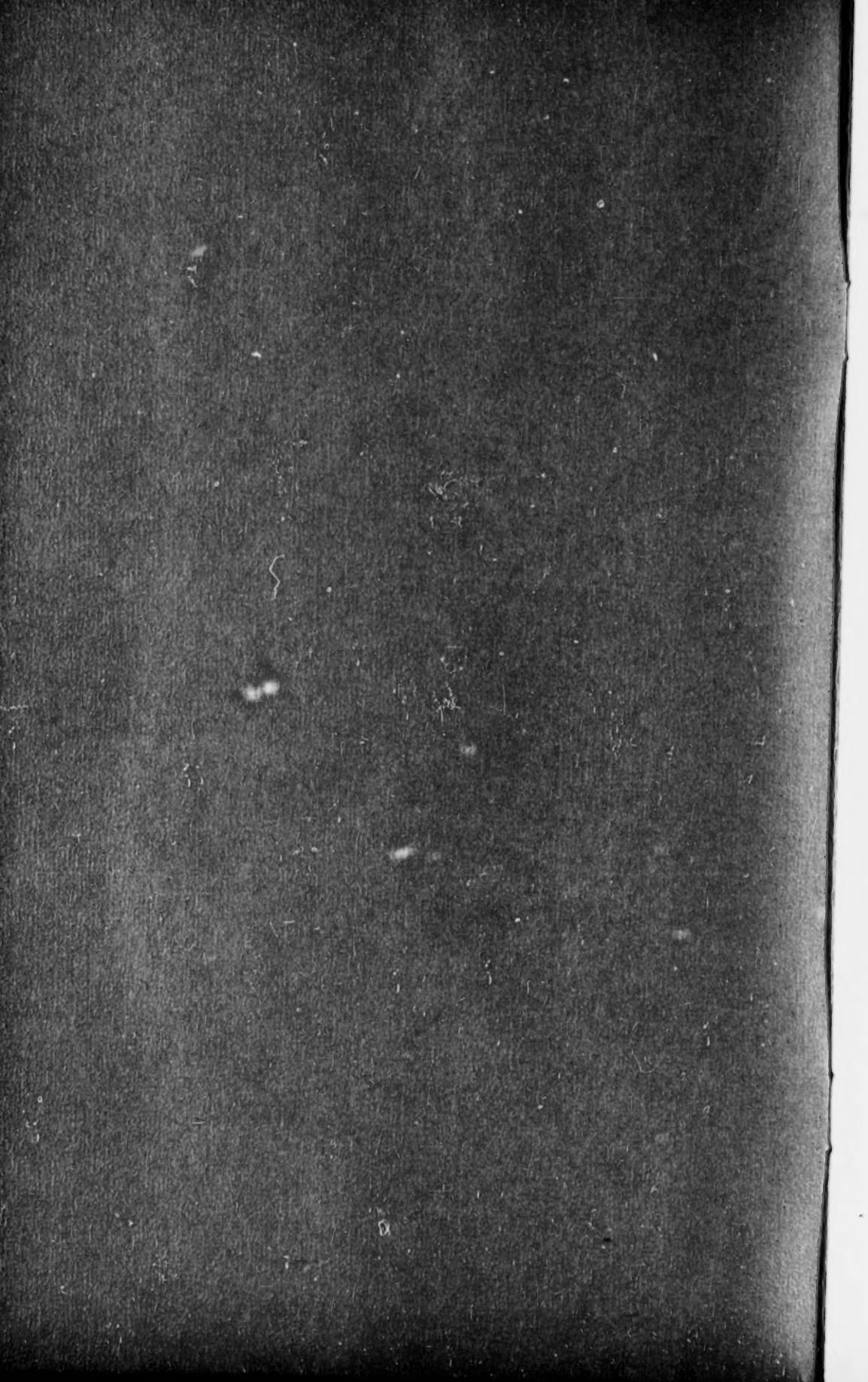


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AMICUS CURIAE'S INTEREST IN THIS CASE

Florida Land Title Association, Inc. ("FLTA") is a nonprofit membership corporation composed of more than 350 abstracters, title insurance companies and title insurance agents doing business in Florida. The services rendered by FLTA members are designed to facilitate title transactions and assure real estate transferees that their interests will be secure from third party claims.

FLTA has an interest in this case because of the drastic adverse effect the Florida Supreme Court's decision will have on (1) FLTA's members and the title industry generally, (2) owners of two-thirds of all privately held real property in the state of Florida, (3) the continued viability of the conveyancing system, and (4) the marketability and market value of all real property.

The decision below ravages the security of public deeds and the rules of law upon which the structure of private conveyancing depends. If allowed to stand, it will throw Florida conveyancing into massive turmoil and necessarily subject title insurance companies to incessant claims upon their resources and possible bankruptcy—and this by exposing them to the very kind of risks against which Florida's marketable record title act had promised them protection.

The Conveyancing System

The system of conveyancing in the United States efficiently protects transferees of interests in real property against losses from title defects. It is so effective that litigation involving *substantive legal* issues relating to title has become rare.¹

¹ Reichman, *Toward a Unified Concept of Servitudes*, 55 S. Cal. L. Rev. 1177 (1982).

Although the system producing this dramatic result is complex in detail, the essential components are (1) recording laws, (2) public land records implementing those laws, (3) curative statutes, (4) a tradition of sound and unambiguous property laws on which sellers and purchasers have been able to rely, and (5) the specialized services provided by title insurance companies.

Recording Laws and Land Records

Recording laws cut off most interests in real property that are not evidenced by or inferable from recorded instruments. Under these laws, a system of public land records has evolved that permits determining with a high degree of accuracy whether the title of a transferee will be free from third party claims.

At common law, the title history of any parcel of land *had to be* traced to its origin, but this system proved manifestly unworkable because few titles can be traced that far. Old breaks in the chain are common. Without recording and curative statutes any break in a chain of title, however minute, could cast a perpetual shadow over all future land transfers. Breaks become harder to cure as time passes. Possible claimants who might sign quit claims become impossible to locate, the physical condition of the property changes,² memories of witnesses fade, and other available evidence decays. Curative statutes eliminate most

² This Court is in a poor posture to evaluate the work of those surveyors of many decades past. It can only be accepted that they did their job as instructed and recorded what they found then, which may or may not be what appears now. Freshwater lakes and ponds do change rather significantly because of both natural and artificial alterations in the areas involved. It is to be observed that governmental conveyances were made in reliance on them and the grantees of such conveyances had the right to assume the U.S. Government and the Trustees were acting lawfully.

Mobil Oil Corporation v. Coastal Petroleum Company, 2 Fla. Supp. 2d 12 (Fla. 10th Cir. 1982), citing, *Odom v. Deltona Corp.*, 341 So.2d 977, 984 (Fla. 1977).

of these risks and the complex and pointless title litigation that would be generated in their absence.

Marketable Record Title Laws

One key to an efficient system of conveyancing is the marketable record title act. The basis of marketable title acts is described by Professor Barnett³ as follows:

Marketable title acts are intended to operate in conjunction with, rather than as a substitute for, the recording Acts. They seek to extinguish old title defects automatically with the passage of time. The Acts provide that if a person has an unbroken chain of title from the present back to his "root of title," then he has the sort of title in favor of which their extinguishment feature will operate. His "root of title" is the most recent transaction in his chain of title that has been of record at least forty years.⁴

The effectiveness of marketable record title acts depends on the scope of their coverage. In a state like Florida, where huge portions of the land are traced to sovereign grants, they would be of no effect whatsoever if they did not cut off *governmental* as well as private interests. It is scarcely of any comfort to a prospective buyer that the challenger to his or her title is a well-financed public official instead of an ordinary private party.

The Role of Title Insurance

A sound system of conveyancing requires more than well conceived recordation and marketable record title acts. It also depends upon the expertise of the private parties who operate

³ Barnett, *Marketable Title Acts—Panacea or Pandemonium*, 53 Cornell L. Rev. 45, 52-53 (1967).

⁴ The 40-year period is most common and is the one used for illustrative purposes throughout this article. [Florida has a 30-year period, Fla. Stat. § 712.02 (1985)] (Footnote in original)

the system. The mission of title insurance companies and allied firms is to provide the services needed to ascertain the state of titles from the public records. The key to understanding the industry is the recognition that insurance is sold primarily to bond the services the industry provides. The individual buyer or seller knows little about the intricacies of title examination, and cares less. What he or she desires is an assurance that title work done by professionals is correctly done. As private owners cannot inspect or supervise the work themselves, title insurance companies provide them with a guarantee in the form of insurance about the state of title. Title companies provide information as to clouds on titles, which can be cured *before* a transaction goes forward. Title companies bond the effectiveness of their services by agreeing to pay money if a further defect in title emerges.

The Instant Case

The system of title insurance, the level of premiums collected, and the services title companies provide, depend totally upon the integrity of the recordation system and the marketable record title acts. The decision of the Florida Supreme Court, if allowed to stand, will throw the entire mechanism into total disarray. Under it, the state will be able to challenge its own conveyances made 100 years ago or more because it will no longer be bound either by its own classification system or by deeds made by Trustees of its Internal Improvement Fund. The confusion will be statewide. More than 20 million acres of valuable land were sold by the state as swamp and overflow lands in the years between 1850 and 1918. The state's own Department of Natural Resources estimates that 11,900 miles of river and 3736 lakes are subject to these belated state sovereignty claims. Yet the evidence of navigability on which *every* single claim rests is not ascertainable by metes and bounds. Quite the

opposite, it depends on one hundred year old history, on the physical condition of the property in 1845 when Florida came into the Union. The evidence needed to adjudicate these claims decayed at a rapid rate, spurred on by each flood and storm, and by each expansion or contraction of river course or channel. The administrative costs of redetermining the condition of any particular parcel 140 years ago will be high, and the reliability of any such determination is certain to be low. The decision below maximizes uncertainty for uncertainty's sake.

Virtually all of these cases involve land for which title insurance has been issued, so that FLTA members will be required to foot a large part of the bill for a set of risks from which they (and their insureds) had been promised protection by the MRTA.⁵ The state of Florida estimates that it will spend as much as \$900 million dollars to establish its claims if only 25 percent of the affected landowners decided to mount a defense. That money will have to be raised by taxation, much of it from the same individuals who will be forced to spend (as a first approximation) \$900 million dollars of their own money to defend these claims.⁶ Much of this money will come from title insurance companies, who may well be saddled with extensive indemnity payments in cases they lose.

Nor do matters rest here, for the incentive effects of the decision must be taken into account as well. Until these matters

⁵ It is well understood today that no system of insurance can function in the face of common mode failures, which make it impossible for insurers to diversify the risks of their policyholders. See Danzon, *Tort Reform and the Role of Government in Private Insurance Markets*, 13 J. Legal Stud. 517, 534-539 (1984). Here there is a high correlation of insurer risks because all of these lawsuits stem from the same retroactive reinterpretation of the state's marketable title acts.

⁶ The likely estimate would be more if only because each individual owner would have high start up costs because of the need to engage separate counsel.

of title are resolved on a case by case basis, the sale of real estate will come to a grinding halt as buyers and sellers find themselves unable to agree on how to allocate the ever-present risk of government suit. Trade and commerce will be paralyzed while the state of Florida continues its quixotic effort to right wrongs which in all probability never occurred. In the process, these claims will threaten the lifeblood of commerce and the financial viability of the title industry. The industry's only crime has been to rely on the state's promise that MRTA meant what it said. No company has charged a penny in premiums to cover the risk of the state's illegally reneging on its own conveyances.

Threat to Industry Survival

It is not an overstatement to suggest that the Florida Supreme Court's dramatic reversal of prior decisions promising security of titles threatens the economic survival of title insurance companies in Florida whose aggregate reserves and capital are far less than the amount Florida expects to spend in prosecuting claims against persons title companies have insured. The decision of the court has created a madcap situation in which everyone but lawyers and bureaucrats will lose. The time to set the matter aright is before more wasteful and destructive litigation takes place. That time is now.

ARGUMENT

A. Introduction

Petitioner's brief discusses the three drastic changes in state law wrought by the decision of the Florida Supreme Court.⁷

⁷ The changes made by the decision (1) permit the state to reclassify land conveyed over 100 years ago as swamp and overflow land, (2) abrogate the doctrine of estoppel which was formerly available to prevent the state from reneging on its deeds, and (3) re-interpret the MRTA as never having applied to sovereignty land.

Petitioner has focused primarily on the court's refusal to recognize the conclusiveness of the classification decisions made by the Secretary of the Interior and the State of Florida when the land was originally sold. We agree with petitioner that, by opening the door to reclassification, the Florida court has "taken" petitioner's property. But we focus our argument primarily on the court's cavalier abrogation of the security of titles that the state guaranteed through the MRTA, as it had been construed in earlier Florida Supreme Court decisions.

1. The Florida Marketable Record Title Act

One question before the Florida Court was whether the MRTA, as enacted in 1963⁸, applied to state grants. The issue arose when the Trustees contended that, 100 years ago when most of these deeds were made, they had authority to convey only Swamp Lands but were then without power to convey sovereignty lands. If the MRTA applied, the Trustees are foreclosed from attacking the validity of their prior deeds on any ground not specifically reserved in the deeds themselves. If MRTA did not apply, Florida will be able to attack *all* previous grants made by the Trustees.

Section 712.02 of the MRTA provides that any person whose claim of title is based on a title transaction that has been of record over thirty years has a marketable record title free of all but enumerated claims. Section 712.04 extinguishes all claims not specifically excepted (including "governmental" claims) that pre-date the thirty-year period. One exception is made for interests of the state or federal government "reserved" in the patent or deed by which the state or federal government parted with title.

⁸ Fla. Stat., Ch. 712 (1963).

This case involves state claims to interests that were not reserved in the deeds by which the state parted with title.

In 1978, the MRTA was amended to except *for the first time* the state's claim of title to lands beneath navigable waters that the state had acquired when it was admitted to the Union.¹⁰ The Trustees have asserted that the lands at issue in this case are sovereignty lands and that the state's claim was not extinguished by the MRTA.

2. Decisions of Florida Lower Courts

The trial court¹¹ and the district court of appeal¹² determined, as a matter of law, that the lands in this case could not be regarded as sovereignty lands; consequently, the 1978 exemption could not apply. They went on to hold that, even if the lands were sovereignty lands, the 1978 sovereignty lands exemption could not be retroactive because a retroactive application would unconstitutionally deprive property owners of rights that vested when the MRTA became effective in 1963.¹³ Thus, the lower courts concluded that, even if the lands were sovereignty lands, the MRTA extinguished the state's claim.

3. Decision of the Florida Supreme Court

The Florida Supreme Court reversed the lower court decisions and held that the MRTA never applied to sovereignty lands. In a strangely casual opinion, over a strong dissent, the majority *sub silentio* found that the MRTA, as originally enacted,

¹⁰ See 1978 Fla. Laws, Ch. 78-288.

¹¹ *Mobil Oil Corporation v. Coastal Petroleum Co.*, 2 Fla. Supp. 2d 12 (Fla. 10th Cir. 1982).

¹² *Coastal Petroleum Co. v. American Cyanamid Co.*, 454 So.2d 6 (Fla. 2d DCA 1984) and *Board of Trustees of the Internal Improvement Trust Fund v. Mobil Oil Corporation*, 455 So.2d 412 (Fla. 2d DCA 1984).

¹³ See 454 So.2d at 9.

did not apply to state grants. In arriving at this result, the court overruled its own precedents, changed its interpretation of Florida Statutes, and, by judicial fiat, took private property without just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

B. The Fifth and Fourteenth Amendments to the United States Constitution Apply to State Judicial Acts

This case raises the fundamental question of whether, even though a state is prevented by the Constitution from taking private property by action of its legislature or executive, it may achieve the same result, free of constitutional restraint, by acting through its courts. The Fifth Amendment command "nor shall private property be taken for public use, without just compensation" has long been held applicable to states through the Fourteenth Amendment. On its face, the Fourteenth Amendment imposes a *general* prohibition, binding on *all* branches of state government, not only the executive and the legislative.

What scant precedents exist support the basic proposition that *any* state judicial action which takes private property is subject to the same constitutional limitations that apply to other state agencies.

An early application of the taking and due process clauses to judicial action is in *Muhlker v. Harlem Railroad Co.*, 197 U.S. 544 (1905). Plaintiff in that case claimed an easement of light and air over a public street under an 1827 deed. Prior decisions of the New York Court of Appeals had held that similar deeds prevented railroads from building their tracks above grade without paying compensation to holders of the easements. When the New York court tried to distinguish its own precedents, this Court examined the soundness of the court's reasoning. Finding

that the purported grounds of distinction were frivolous, it intervened and held that vested rights are explicitly protected from judicial as well as from legislative confiscation.

The same logic underlies Justice Stewart's concurrence in *Hughes v. Washington*, 389 U.S. 290 (1967), where a private landowner brought an action to establish his ownership of accretions on oceanfront property. The Washington Supreme Court, holding that state law controlled, found for the state. Eight members of the Court resolved the issue in favor of the private owner on the ground that federal law governed. Only Justice Stewart's concurrence addressed the issue which this case puts squarely before the Court. In Justice Stewart's view, even if state law did apply, the Washington court's prior judicial decision had vested title in the landowner exactly as a statute would have done. Justice Stewart observed that the state could not abrogate the landowner's title by judicial action:

[T]he Constitution measures a taking of property not by what a State says, or by what it intends, but by what it does. Although the State in this case made no attempt to take the accreted lands by eminent domain, it achieved the same result by effecting a retroactive transformation of private into public property—without paying for the privilege of doing so. Because the Due Process Clause of the Fourteenth Amendment forbids such confiscation by a State, no less through its courts than through its legislature, and less when a taking is unintended than when it is deliberate, I join in reversing the judgment.

Id. at 297-298.

Justice Stewart's concurrence in *Hughes* was followed by the Ninth Circuit decision, *Robinson v. Ariyoshi*, 753 F.2d 1468 (9th Cir. 1985), *vacated and remanded on other grounds*, ____ U.S. ___, 106 S.Ct. 3269 (1986). *Robinson* involved ownership of water rights to certain "normal daily surplus water"

which had been obtained under a land grant. In the course of litigation during the 1920s and 1930s, Robinson's title to the water rights had been established by authoritative decisions of the Hawaii courts. Long after those decisions, the Hawaii Supreme Court *sua sponte* overruled all prior water law cases, adopted the English view of riparian rights and held that there was no category of normal daily surplus water of the kind Robinson claimed. The Ninth Circuit was faced with the question of whether the state could validly revoke Robinson's water rights by a judicial decision that negated the entire general property rights regime under which his rights had been fully and lawfully vested. The Ninth Circuit found the Hawaii court's decision constitutionally repugnant:

The state conceded at oral argument that the Fourteenth Amendment would require it to pay just compensation if it attempted to take vested property rights. The substantive question, therefore, is whether the state can declare, by court decision, that the water rights in this case have not vested. The short answer is no.

Id. at 1473.

The long answer is every bit as instructive.

The parties concede that the State of Hawaii has the sovereign power to change its laws from time to time as its legislature may see fit, and may, by changing its law, radically change the definitions of property rights and the manner in which property rights can be controlled or transferred.

The state may also change its laws by judicial decision as well as by legislative action. Insofar as judicial changes in the law operate prospectively to affect property rights vesting after the law is changed, no specific federal question is presented by the state's choice of implement in changing state law. See *Hughes v. Washington*. 389 U.S. 290, 295 (1967) (Stewart J. concurring).

We assume, therefore, for the purposes of this case, that the Supreme Court of Hawaii was acting well within its

judicial power under the state constitution when it overruled earlier cases and declared for the first time, after more than a century of a different law, that the common law doctrine of riparian ownership was the law of Hawaii. This declaration of a change in the water law of Hawaii may be effective with respect to the real property rights created in Hawaii after the *McBryde I* decision became final. New law, however, cannot divest rights that were vested before the court announced the new law. See *Hughes*, 389 U.S. 295-98.

Id. at 1474.¹³

As a matter of constitutional principle, the law must be as Justice Stewart and the Ninth Circuit have described it. Consider the law of adverse possession. Suppose that an authoritative judicial decision has established that an adverse possessor can obtain perfect title even when he knows that his own claim is made in bad faith. A bona fide purchaser takes title in reliance on the rule. The highest state court wishes to change that rule to provide that only good faith possessors can perfect title. This leaves the bona fide purchaser in the position of having to litigate the issue of whether his predecessor acted in good faith. The court may surely change the rule prospectively. But, consistent with the requirements of the due process and just compensation clauses, it cannot do so retroactively where the effect would be to plunge into uncertainty the very titles that its own laws had vested.¹⁴

¹³ See also *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964) (First and Fourteenth Amendments limit the state's common law of defamation).

¹⁴ We recognize that the State of Florida could insert a term in its grants reserving the right to challenge the title of the grantee or his assignee, even in perpetuity. Yet there is a tremendous functional difference between the prospective and retroactive adoption of this practice. In the prospective case, powerful economic constraints would discipline state practice. It would have to find a buyer, willing to pay a decent price, despite so onerous a constraint. But this economic restraint on public behavior would be wholly inoperative if Florida could repudiate its grants after the deeds are signed, sealed and delivered. If set free from constitutional constraint, Florida would no longer need to fear the price of its own political decisions. It could impose the costs upon innocent grantees by conduct which is every bit as

This case presents this stark issue of constitutional principle in relation to a judicial abrogation of titles vested under the MRTA. To date, an unanswerable concurrence by Justice Stewart and an unanimous decision by the Ninth Circuit are the only judicial opinions which support the indubitable proposition that the state cannot so alter its general rules of property law to defeat rights vested under a prior rule. This case offers the Court the opportunity to remove any lingering doubts on what should be an incontrovertible proposition of constitutional law. It remains only to demonstrate that Florida has overruled its decisive precedents holding that MRTA does apply to state grants.

C. *The Decision of the Florida Supreme Court has Taken Petitioner's Property by Overruling or Ignoring the Applicable Precedents Under Which Its Rights Had Become Fully Vested.*

1. The general principles of taking law do not allow the state to place an owner's vested rights at risk without any compensation or police power justification.

This Court has stressed repeatedly that it has not been able "to develop any 'set formula' for determining when compensation should be paid," and has relied on essentially "ad hoc

outrageous as the behavior of the State of Georgia, condemned in *Fletcher v. Peck*, 10 U.S. (6 Cranch.) 87 (1810) (holding under the contracts clause that the legislature without compensation could not rescind its prior grants after the subject property had been conveyed to third parties who took in good faith) and of New Hampshire, condemned in *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819) (contracts clause prohibits state from revoking or modifying its charter without compensation). While both *Dartmouth College* and *Fletcher* were decided under the contracts clause, the principles involved in those cases are identical to those applicable here. If a state can acquire vested rights by demand, it diminishes the rights of the individuals whom it oppresses and destroys the productive capacities of our people generally. Land grabs offer the paramount abuse against which the taking and due process clause guards. The need for vigilance does not cease because the source of oppression is state judicial action.

factual inquiries" to resolve this difficult issue. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978). In essence, modern taking doctrine has been a delicate counterpoint in which the degree of restriction imposed on an owner's rights is balanced against the strength of the justification the state offers for its action. No such need for balancing infects this case which lies at the extreme end of the legal spectrum: if Florida and Coastal prevail, petitioner's *entire interest* is destroyed. This case does not involve *any* comprehensive scheme of social or environmental control, such as the historical landmark designation statutes upheld in *Penn Central*. Petitioner has not contested the state's right to impose necessary regulations to protect its wetlands or the environment. Quite the contrary, all that is at stake in this case is ownership of mineral interests of the very sort that received emphatic constitutional protection in *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922). What Florida and Coastal seek is money¹⁵ for minerals previously mined.

2. The Florida Supreme Court's reinterpretation of the Marketable Record Title Act amounts to an unconstitutional taking of vested property rights.

Amicus recognizes that this Court cannot superintend every detail of state law to determine whether a decision has deprived litigants of property rights secured by the Constitution. Yet, by the same token, state courts cannot be subject to constitutional scrutiny only where, as in *Robinson* and *Hughes* (but not *Muhlker*), they have *expressly admitted* to abandoning previous systems of property rights. A state court that overrules its prior decision *sub silentio* should be subject to the same standards of

¹⁵ "Contrary to the various suggestions that the present cases pertain to issues of environmental protection, it should be made known that what these cases involve is money." *Coastal Petrol. um Co. v. American Cyanamid Co.*, 492 So.2d 339, 349 (Fla. 1986) (Boyd, C. J., dissenting).

review as courts that have acted openly. There is no reason to encourage states to obscure the basis of their decisions in order to immunize their actions from review. This Court can surely review state decisions for impermissible retroactive takings when they have *no* colorable basis in law or in fact.

The most obvious illustration of that principle is here, where the Florida court has falsely dismissed its own binding precedent as "irrelevant dicta." The dispositive case is *Odom v. Deltona Corp.*, 341 So.2d 977 (Fla. 1976), there the Florida Supreme Court construed the 1963 MRTA which had been passed in response to the great uncertainty that existed with respect to land titles in Florida. MRTA's provisions expressly applied to all conveyances, private or *governmental*.¹⁶ In *Odom* the court held that "the claims of the Trustees to beds underlying navigable waters previously conveyed [were] extinguished by the Act." *Id.* at 989. Here the Florida Supreme Court offered *no* reason to distinguish *Odom*. It characterized *Odom* in the following statement:

The ground on which *Odom* rests is this factual determination that small lakes and ponds at issue were non-navigable, non-sovereignty lands. Unfortunately, even though this factual determination controlled and resolved the case, we went on to answer irrelevant arguments put to us by the parties and in answering one such argument concluded that MRTA was applicable to sovereignty lands encompassed within conveyances of swamp and overflowed lands and that the claims of trustees "to beds underlying navigable waters previously conveyed are extinguished by the Act."¹⁷

¹⁶ "[M]arketable record title shall be free and clear of all estates, interests, claims or charges *whatsoever* ... held or asserted by a person ... whether such person is natural or corporate, or is private or *governmental* ... except any right, title or interest reserved ..." Fla. Stat., 712.04 (1985) (*emphasis added*).

¹⁷ *Coastal Petroleum Co. v. American Cyanamid Co.*, 492 So.2d 339, 344 (Fla. 1986), *citing*, 341 So.2d at 989.

This passage grossly misstates not only the facts found in *Odom*, but also the principles of law the *Odom* court applied to those facts.

(1) Facts: The Florida Supreme Court's description of the facts in *Odom* is manifestly false. In *Odom*, the court had taken the unusual step of reprinting the entire opinion of the trial court because of its "clarity." The trial court had granted a motion for summary judgment against the state because there was "no genuine issue of fact" 341 So.2d at 349. In this case, the Florida court writes as though summary judgment had been awarded because *Odom* clearly involved lands known to be non-sovereignty and non-navigable. But in *Odom* the findings were diametrically opposite to the facts in the revisionist description of them contained in the opinion below. The trial court's Finding Number 2 notes that the disputed lands were "certain non-meandered lakes and ponds." The rival claims of title were then noted by the trial court as follows:

Deltona claims to own the lakes in question under various chains of title originating either in U.S. Patents or deeds of the Trustees of land acquired by the state under the Swamp and Overflow Lands Grant Act of September 28, 1950 [sic]. The Trustees claim that the lakes were the waters, beds and shores of navigable water which are held by the state in trust for the public by virtue of state sovereignty.

Id. at 979.

The entire point of *Odom* is that the court was able to grant Deltona its summary judgment *without* having to resolve the factual question of whether the lands acquired from the state were sovereignty or swamp lands. Deltona won *either* because it had good title to ~~swamp~~ land *or* because MRTA blocked the state's claim to retain sovereignty land. Mobil's position is indistinguishable from Deltona's. Accordingly, under *Odom*, the entire dispute in the instant case should have been resolved on the

face of the pleadings. Nothing could be clearer. Even the Trustees recognized the factual record that the Florida Supreme Court later denied: "It is also clear that the Circuit Court in *Odom* made no factual determination of the navigability of the lakes in issue." (Trustees' brief, Fla. Sup. Ct., at page 26.)

(2) Law: In *Odom*, after an extensive review of the relevant authorities, the Florida Supreme Court wrote:

It seems logical to this Court that, when the Legislature enacts a Marketable Title Act, as found at Chapter 712, Florida Statutes, clearing any title having been in existence thirty years or more, the state should conform to the same standard as it requires of its citizens; the *claims of the Trustees to beds underlying navigable waters previously conveyed are extinguished by the Act.* Stability of titles expressly requires that when lawfully executed land conveyances are made by public officials to private citizens without reservation of public rights in and to the waters located thereon, a change of personnel among elected state officials should not authorize the government to take from the grantee the rights which have been conveyed previously without appropriate justification and compensation.

Id. at 989 (emphasis added).

The nature of the court's decision in this case is revealed, not only by the court's disingenuous reasoning, but by the political context in which the decision was rendered. The decision was in fact a belated response to eight years of supplication by the executive branch of the state government. In 1978, reacting to the court's *Odom* decision, the Governor called a special session of the legislature to amend the MRTA in order to exempt sovereignty lands from its operation. This 1978 episode is in itself well nigh conclusive evidence that the 1963 legislature meant what it said: the 1963 Act applies to sovereignty lands. Why else introduce the 1978 bill at all? Following well settled Florida precedent, the trial and intermediate appellate courts uniformly refused to give the 1978 amendment retroactive effect.

Political pressures continued to build.¹⁸ In the spring of 1986, a concerted movement again developed to have the legislature "declare" that the MRTA had never applied to land under navigable waters previously conveyed by the state. That legislation was strenuously opposed on the very ground that the FLTA urges here: that such an amendment would constitute a taking of private property for public use without just compensation. The Florida Supreme Court's decision spared the legislature the necessity of voting at all on this issue. But the fact that the state acted through its courts rather than its legislature does not lift the large constitutional cloud that hangs over the decision. No verbal legerdemain can conceal the gross misreading that the Florida Supreme Court made first of MRTA and then of its own dispositive precedent in *Odom*. Its assault on vested rights cannot be corrected by the political process,

¹⁸ A news item in the Florida Times-Union on May 22, 1985, sixteen days after oral argument before the Florida Supreme Court in the instant case, explains the situation:

"The state will never abandon these lands" [Governor] Graham said. "It is time for the Legislature to tell the courts, in no uncertain terms, that we intend to keep our sovereign lands, that we never gave them up and that we will not tolerate this abuse of the law."

Florida Times Union, May 22, 1985.

The following news item appeared in the same paper the day after the Florida Supreme Court rendered its decision:

The ruling came down just thirty minutes before Senate President, Harry Johnston, D-West Palm Beach, was to meet some of those groups to hammer out compromise legislation on MRTA - the compromise in which the state would have relinquished much of the land which the court ruling lets the public keep.

"I think we are all extricated from a tough political decision to make, and I'm very glad they made it for us," said Johnston who is running for governor.

He said he doubted even if the Senate compromise would have passed the House. House leaders were supporting a more conservative approach by Representative Fred Dudley, R-Ft. Myers, that would have left the land in private hands but codified the state's right to regulate the use of the waters.

Florida Times Union, May 16, 1986.

much less by the Florida Supreme Court. This Court is the only forum in which this grievous wrong may be redressed.

CONCLUSION

This case demonstrates in sharp and uncompromising form the need to define the constitutional limits on the power of a state court to alter and amend its own common law of property and to give its decisions retroactive effect. Amicus recognizes that it would be wholly inappropriate to adopt a constitutional principle that would preclude natural development of the common law. But this is not that kind of case. Here the Florida court, by sheer fiat, has changed the rules of the game in midcourse for the benefit of the state. By misreading and ignoring its own unambiguous precedents, the court has retroactively decreed a wholesale confiscation of longheld vested rights. If it is allowed to succeed in this effort, other courts will be tempted to follow in its footsteps. A writ of certiorari should issue so that this Court can make it clear that constitutional prohibitions against state confiscation remain firm. The cloud this decision places on the title to nearly two-thirds of the privately-owned land in Florida must be lifted.

For the reasons stated, certiorari should be granted to review the decision of the Florida Supreme Court.

Respectfully submitted.

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